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## COMMENTARY

# THE FUTURE OF LIBERAL LEGAL SCHOLARSHIP†

*Ronald K.L. Collins\**  
& *David M. Skover\*\**

Earl Warren is dead.

A generation of liberal legal scholars continues, nevertheless, to act as if the man and his Court preside over the present. While this romanticism is understandable, it exacts a high price in a world transformed.

The following commentary is a reconstructive criticism<sup>1</sup> written from the perspective of two liberals<sup>2</sup> concerned about the future of "legal liberalism." We present our views as a commentary to emphasize their preliminary character; they represent our current assessment of where liberals stand and where they might redirect their energies.

In Part I, we outline the reasons for believing that there is cause for alarm, though not resignation, in the liberal legal community. We also define the contours of what we mean by "liberal legal scholarship." In Part II, we discuss how conservatives have managed, with varying degrees of success, to frame the nature of public law discourse in the 1980s, and how liberals have reacted, and are likely to continue

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1. We use the expressions "reconstructive criticism" or "reconstructive thought" to emphasize that, although we may be critical from within by reevaluating liberal legal theory and politics, we are not critics from without, abdicating either responsibility or efforts to redirect legal liberalism.

2. We mention this in order to acquaint the reader with the general perspective from which we view social reality and the legal order, open-minded as we strive to be. In Part I of this commentary, we set out some definitional guidelines as to our meaning of "liberal." In a more quixotic sense, our liberalism consists of an abiding commitment to certain values. See J. STEINBECK, *THE GRAPES OF WRATH* 462-63 (1939).

to react, to this phenomenon. We then describe what we believe to be the pitfalls of such "reactive" scholarship.

In order to suggest some broad avenues for future liberal scholarship, we offer in Part III a historical account of the approaches taken by liberal scholars to meet the challenges of conservatism in law and politics during the period from 1876 to 1937. While the parallels between that era and our own are, of course, not exact, the lessons of that period do offer a wealth of experience and thought upon which liberals may draw. Finally, in Part IV, we examine three avenues that may be available, among others, for intellectually powerful and politically effective liberal legal scholarship. In doing so, we analyze inherent shortcomings of liberal legal theory, and suggest that future liberals reevaluate their commitment to current individual rights consciousness.

It is not our purpose to develop any full-blown constitutional theory. Rather, we aim to critique predominant intellectual problems in liberal legal theory, thereby identifying the constructs that liberal scholars must alter or abandon; to suggest the general contours within which a new liberal scholarship, however defined, might operate; and, finally, to introduce, by way of illustration, some possible alternative avenues for liberal legal scholarship.<sup>3</sup> Alternatively, at the least, we hope that our comments will spark debate and discussion among liberal scholars.

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3. A charge may be leveled against our supposition that liberal legal scholarship is, or should be, cognizant of politics. Critics could be troubled by what they see as result-oriented argumentation that is not value neutral. ("We are," so the argument goes, "*legal scholars*, not mere political tacticians or moral philosophers.")

To this charge, we offer two responses and a question. First, this charge obviously has no bearing on the policy reform work of legal scholars directed to lawmakers and law enforcers rather than to courts. Similarly, it has little or no bearing on what lawmakers and executive officers should do to confine governmental action within constitutional bounds. In fact, the charge may be faulted for its obsession with judicial review: "Because constitutional scholarship has remained consistently preoccupied with the institutional concerns of the judicial process, it sees constitutional law as composed of questions about what judges should do, not what government should do." Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 251 (1972).

Second, the avenues for future liberal scholarship introduced in Part IV are essentially consistent with the premise of the charge that scholars should not transform judicial decisionmaking into judicial statecraft. To the extent that liberal scholars pursue broad socioeconomic reforms, we recognize the importance of directing these efforts to the federal and state political branches.

These preliminary responses should suffice. In keeping with the theme of the charge, we call on the critics to answer the following: Can any legal scholar who asserts any allegiance to liberalism tolerate a vision of the Constitution which extols *Plessy v. Ferguson* and deprecates *Brown v. Board of Education*? In other words, isn't there some limit to value neutrality in the enterprise of a liberal legal scholar?

## I. SETTING THE SCENARIO

How will liberal legal scholars respond to the new realities of the next decade and the twenty-first century?

This question arises against a menacing backdrop. Conservatives have won the lion's share of presidential contests since 1970. There has not been a Democratic appointment to the Supreme Court in over two decades. The egalitarian revolution of the Warren Court is slowly winding down. Moreover, since 1980, the Department of Justice, the Legal Services Corporation,<sup>4</sup> the Civil Rights Commission,<sup>5</sup> federal regulatory agencies,<sup>6</sup> and even the Commission on the Bicentennial of the U.S. Constitution<sup>7</sup> have distanced themselves from the post-war liberal agenda.

Meanwhile, Ronald Reagan has created an enduring institutional legacy.<sup>8</sup> In fewer than eight years, he has reshaped the federal bench, both in numbers and in judicial philosophy. Reagan has named more judges of lower federal courts — some 398 in all<sup>9</sup> — than Franklin D. Roosevelt did in 12 years with 203 judges. More than 48% of the sitting federal judges are Reagan appointees.<sup>10</sup> Reagan judges command a majority in all but four of the twelve federal courts of appeals.<sup>11</sup> They predominate in the influential Courts of Appeals for the

4. See Coyle, *The Social Agenda Hits a Brick Wall*, Natl. L.J., Apr. 18, 1988, at 24 (in spite of Reagan administration attempts, Legal Services Corporation (LSC) not abolished, but its funding drastically reduced); Ponce, *Lawmakers Claim Legal Services Chairman Misused Funds*, Wash. Times, July 11, 1988, at A5, col. 1; Marcus, *Legal Services Corp. Drops Advisers*, Wash. Post, Apr. 23, 1988, at A11, col. 1 (LSC hired lawyers to "advise it in its attempt to persuade Congress to cut its budget.").

5. See, e.g., Mehler, *Rightist on the Rights Panel*, NATION, May 7, 1988, at 640, 642 (Commissioner Mary Frances Berry said, "[The Civil Rights Commission] has become dangerous to anyone who is interested in furthering civil rights."); Berry, *Taming the Civil Rights Commission*, NATION, Feb. 2, 1985, at 106.

6. See *Regulation: Fragile Change at Best*, Natl. L.J., Apr. 18, 1988, at 26. A notable exception is Surgeon General C. Everett Koop, who admirably guided public policy affecting vital health issues.

7. See Kitman & Yodaiken, *Celebrating (Yawn) the Constitution*, NATION, July 2/9, 1988, at 1.

8. According to the director of the Center for Judicial Studies, a conservative think tank, "[t]here is no question that [Reagan's judicial appointments record] is the most lasting and significant achievement of the Reagan administration." Wermiel, *Reagan Choices Alter the Makeup & Views of the Federal Courts*, Wall St. J., Feb. 1, 1988, at 1, col. 1.

9. Telephone interview with Sheila Joy, Staff Assistant to the Deputy Attorney General (July 7, 1988) [hereinafter Joy Interview]. As of the time of this writing, 30 nominees of the 398 named have not yet been confirmed by the Senate, and may not be. See Cunningham, *Hanging Judges*, NATL. REV., May 27, 1988, at 40.

10. Joy interview, *supra* note 9; *Reagan Justice*, LEGAL TIMES, May/June 1988 (Special Supplement); O'Brien, *Reagan's Legacy for U.S. Courts*, L.A. Times, Aug. 23, 1987, § 5, at 1, col. 1. These data were updated by the authors using Wermiel, *Full-Court Review of Panel Rulings Becomes Tool Often Used by Reagan Judges Aiming To Mold Law*, Wall St. J., Mar. 22, 1988, at 70, col. 1 [hereinafter Wermiel, *Full-Court Review*]; Wermiel, *supra* note 8.

11. See *Reagan Justice*, *supra* note 10, at 10-54. As of this writing, the Reagan judges do not

District of Columbia and Second Circuits. In all of these appointments, the Reagan Justice Department, with former Attorney General Edwin Meese at the helm, has played a dominant role, ensuring the selection of candidates who conform to the administration's political and ideological preferences.<sup>12</sup>

The winds of change can already be detected in recent decisions<sup>13</sup> in discrete areas of constitutional law, such as criminal justice, taking, religious establishment, affirmative action in employment discrimination, privacy, and justiciability doctrines.<sup>14</sup> Specifically, Reagan appointees are only half as likely as appellate judges appointed by Democratic presidents to rule in favor of civil rights plaintiffs, criminal defendants and public interest groups.<sup>15</sup> And, according to two new studies by political scientists C.K. Rowland and Robert Carp, Reagan appointees are already changing the direction of federal law.

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constitute a majority of the judges of the Courts of Appeals for the First Circuit (2 of 6), Fifth Circuit (7 of 14), Ninth Circuit (10 of 25), and Eleventh Circuit (2 of 12).

12. See L. CAPLAN, *THE TENTH JUSTICE* 133-34 (1987); O'Brien, *Judicial Roulette*, in REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON JUDICIAL SELECTION 60-64 (1988).

13. See, e.g., *Reagan Justice*, *supra* note 10, at 7, 11, 12, 30, 31, 34, 36, 38, 39, 41 & 42 (noting influence of Reagan judges). But see Coyle, *The Judiciary: A Great Right Hope*, Natl. L.J., Apr. 18, 1988, at 22 (conflicting views on conservative impact of Reagan judiciary); *Reagan Justice*, *supra* note 10, at 17, 20, 24, 25, 27, 43, 49 & 52 (noting no significant influence).

14. See, e.g., *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987) (recognized cause of action for unconstitutional taking in inverse condemnation); *United States v. Salerno*, 107 S. Ct. 2095 (1987) (sustained pretrial detention provisions of Bail Reform Act of 1984); *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (limited first amendment protections for public school students); *Bowers v. Hardwick*, 478 U.S. 186 (1986) (no right of privacy for homosexual activity); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 1014 (1986) (preferential layoff provision of consent decree violated Equal Protection Clause); *United States v. Monsanto*, 836 F.2d 74 (2d Cir. 1987) (Mahoney & Cardamone, JJ.) (seizure of tainted assets of drug and racketeering defendants); *Michigan Road Builders Assn. v. Milliken*, 834 F.2d 583 (6th Cir. 1987) (Krupansky, J.) (invalidated preferences in state contracts for businesses owned by blacks and women); *Chicago Bd. of Realtors, Inc. v. Chicago*, 819 F.2d 732, 741 (7th Cir. 1987) (Posner & Easterbrook, JJ., concurring) (while voting to uphold Chicago landlord regulation, criticized it for economic impacts and suggested other legal arguments to defeat it); *Associated Gen. Contractors of Cal., Inc. v. City of San Francisco*, 813 F.2d 922 (9th Cir. 1987) (Kozinski, J.) (municipal affirmative action plan for construction contracts invalidated in absence of evidence of past racial discrimination); *Lelsz v. Kavanagh*, 807 F.2d 1243 (5th Cir. 1987) (Jones & Davis, JJ.) (limited federal court authority to order transfer of mentally retarded from state schools to community centers); *Mozert v. Hawkins County Public Schools*, 647 F. Supp. 1194 (E.D. Tenn. 1986) (Thomas Hull, J.) (right of fundamentalist Christian parents to keep children out of public school reading classes because of objections to textbooks), *rev'd*, 827 F.2d 1058 (6th Cir. 1987), *cert. denied*, 108 S. Ct. 1029 (1988). The federal appellate and district court judges who authored the opinions above were appointed by President Reagan.

15. O'Brien, *Reagan's Legacy for U.S. Courts*, *supra* note 10, at 3, col. 5; see also Note, *All the President's Men? A Study of Ronald Reagan's Appointments to the U.S. Courts of Appeals*, 87 COLUM. L. REV. 766, 783 (1987). But cf. Whitman, *Are Reagan's New Judges Really Closest Moderates?*, Wash. Post, Aug. 9, 1987, at C1, col. 4 (drawing on various cases decided by lower court federal judges appointed by Reagan).

For example, data obtained from a 1981 to 1985 study of federal district court decisions reveal the following contrast:

	<u>Affirming Claims of Race Bias</u>	<u>Affirming Claims of Handicap Bias</u>
Carter Appointees	59%	61%
Reagan Appointees	13%	25%. <sup>16</sup>

In the area of criminal justice cases decided by federal district courts between 1981 and 1984, a Rowland, Carp, and Songer study produced these findings:

	<u>Affirming Criminal Justice Rights Claims</u>
Nixon Appointees	32%
Carter Appointees	47%
Reagan Appointees	24%. <sup>17</sup>

Furthermore, the Reagan judiciary apparently discovered a powerful tool in the *en banc* review process, which it has employed with increasing frequency to steer federal courts in a more conservative direction. In the last four years, the number of *en banc* appellate decisions increased 33%, in contrast to a 5% growth from 1976 through 1983.<sup>18</sup> Predictably, liberal rulings by three-judge panels were often reversed.

Yet more troubling for liberals is the prospect that Chief Justice William Rehnquist and Justices Byron White, Sandra Day O'Connor, Antonin Scalia, and Anthony Kennedy will solidify their conservative phalanx, thereby cementing the retrenchment of individual rights at the appellate level. There is another scenario that liberal America cannot countenance: the possibility that Justices Brennan, Marshall or Blackmun might not survive another Republican presidential term.

Even if, after the 1988 elections, the Supreme Court is not dominated by conservative jurists, the conservative victory may still be largely realized if the Court commits to a policy of marginalizing core rights-affirming precedents.<sup>19</sup> With such precedents in place, the Rea-

16. Rowland, Carp & Todd, If Presidents Reagan and Carter Were Judges: The Quantity and Quality of Support for Civil Rights on the Federal Trial Courts 25 (rev. ed. Mar. 25, 1986) (unpublished manuscript).

17. Rowland, Songer & Carp, *Presidential Effects on Criminal Justice Policy in the Lower Federal Courts: The Reagan Judges*, 22 LAW & SOC. REV. 191, 196 (1988).

18. *Full-Court Review*, *supra* note 10.

19. Of course, not all factions within the conservative camp will necessarily seek to marginalize the same core rights-affirming precedents.

gan-dominated lower federal courts would likely continue, or accelerate, their rightward jurisprudential movement.

Any or all of these developments could change the culture of the law in ways that might fundamentally alter the liberal conception of constitutional justice. Regrettably, in the face of these and other realities, liberal legal scholarship is largely bereft of new concepts of the law suitable to the time. It must be emphasized that the *real* crisis in liberal scholarship is not caused by the conservative rise in power; nor will this crisis necessarily be cured by any conservative decline in power. Rather, it is that the realities of the Reagan regime have accentuated the shortcomings of such scholarship. If legal liberalism is in jeopardy, as we fear, it is largely because its scholars have not responded in creative and coherent ways to the conditions which have made its post-FDR/Warren Court agenda nearly obsolete.<sup>20</sup> Functionally, doctrinally, and theoretically, as we describe in Part IV, legal liberalism may have exhausted itself to the point where the ideas of the past may prevent the realization of the ideals of the future.

Admittedly, the contemporary concepts of "liberal" and "conservative" scholarship are necessarily inexact.<sup>21</sup> Within today's liberal and conservative camps, there are such rifts in beliefs and practices that any definitions will undoubtedly be inaccurate, insufficiently comprehensive, or overlapping.<sup>22</sup> It is only possible to align legal scholarship in an imprecise manner with ideological and political values, "interest clusters" that are themselves broadly characterized. No single definition is likely to describe the beliefs of liberal or conservative

20. For an insightful call to liberal law practitioners to set an agenda in a new Republican or Democratic administration, see LaMarche, *An Agenda for the 1990s*, Natl. L.J., June 27, 1988, at 13.

21. This assertion recognizes that the phrase "contemporary liberal legal scholarship" may not be tied to the political value structures rooted in classical liberal political philosophy. For accounts of the transformation of the meaning of "liberal" in American political history from the nineteenth century through the New Deal, see R. McELVAINE, *THE END OF THE CONSERVATIVE ERA: LIBERALISM AFTER REAGAN* 40-44 (1987) (with the rise of industrialism, liberals "underwent a 180-degree turn in their methods," recognizing that great aggregations of capital posed more immediate threats to the common good than did possible abuses of government power); A. SCHLESINGER, *THE CYCLES OF AMERICAN HISTORY* 232-41 (1986) (liberal case for affirmative government as an instrument of greater democracy).

22. Consider, for example, that the conservative constitutional law movement includes both "judicial prudentialists" who promote a limited role for the judiciary in reviewing the constitutionality of the product of the political processes, see, e.g., A. BICKEL, *THE LEAST DANGEROUS BRANCH* 3-4, 9-13 (1962); Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 2-3, 8 (1971), and the recently emerging school of libertarian constitutionalism that promotes judicial activism, or "intervention," on behalf of individual economic rights, see, e.g., *ECONOMIC LIBERTIES AND THE JUDICIARY* (J. Dorn & H. Manne eds. 1987); R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 29-31 (1985); S. MACEDO, *THE NEW RIGHT V. THE CONSTITUTION* 35-37, 50-54, 60 (1987); B. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* (1980); Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

scholars as a whole, or to be attributable in full to any individual scholar.

Nevertheless, liberal scholars generally can be distinguished from their conservative counterparts by certain sociopolitical postures. Today's liberals believe that unfettered economic markets are limited in their ability to serve the public welfare, and that government must play an active role in regulating business and in rectifying gross imbalances in economic power and the distribution of wealth. This belief is in stark contrast to the conservative creed of governmental noninterference in private economic and social choices. Liberals are convinced that political and social egalitarianism are the instruments of democratic government, and that democratic government must be trusted as the register of the common good. Thus, although they are not unconcerned with economic liberties, and have promoted protection of the rights of workers and their opportunities for self-determination, liberals place their priority on social justice and civil equality, whereas conservatives place individual economic freedom of business entrepreneurs at the top of their list of concerns. Yet, liberals have never lost sight of the potential for tyranny in big government; typically, they have opposed governmental regulation of the "private" realms of political and personal choice,<sup>23</sup> again in contrast to conservatives, who are generally willing to cede these points to government.<sup>24</sup>

So understood, contemporary liberal scholars found political consonance and ideological receptivity in the federal judiciary of the War-

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23. *But see* *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972) (Douglas, Marshall & Brennan, JJ., dissenting). On the other hand, liberals have been criticized by the political and scholarly Left for undue attachment to the "public-private" distinction which underlies even this protection of the private realms. *See, e.g.,* Mensch & Freeman, *Liberalism's Public/Private Split*, *TIKKUN MAG.*, Mar.-Apr. 1988, at 24.

24. Excellent analyses of the fundamental sociopolitical beliefs and goals of post-New Deal liberalism, and the contrasting positions of twentieth-century conservatives, are presented in T. FERGUSON & J. ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 9-11 (1986); M. McCANN, *TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM* 72-81 (1986) ("pervasive suspicion of corporate power," "commitment to pragmatic, result-oriented instrumental action," "the best antidote to big business is big government," "popular accountability"); R. McELVAINE, *supra* note 21, at 40-47; A. SCHLESINGER, *supra* note 21, at 237-40. As Arthur Schlesinger recognizes, the political beliefs of contemporary liberals are rooted in Franklin Roosevelt's agenda which he called the Economic Bill of Rights:

"The liberal party," FDR had written, "is a party which believes that, as new conditions and problems arise beyond the power of men and women to meet as individuals, it becomes the duty of the Government itself to find new remedies with which to meet them. The liberal party insists that the Government has the definite duty to use all its power and resources to meet new social problems with new social controls — to insure to the average person the right to his own economic and political life, liberty, and the pursuit of happiness."

A. SCHLESINGER, *supra* note 21, at 240 (quoting 1938 F.D. ROOSEVELT, *PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT* xxix-xxx (1941)).



ren Court years. In the last four decades, the vast bulk of liberal legal scholarship may be characterized by "court-positivism,"<sup>25</sup> particularly in the constitutional field. Liberal scholars treated the progressive constitutional rulings of the federal judiciary as given, needing only to be identified and explained. They directed their efforts to a dialogue with the federal judiciary, defending its activist constitutional review power, and developing its analyses for the protection of civil equality and substantive individual rights.

Thus the attention that constitutional theorists had given during the New Deal to the sweeping power of congressional economic regulation<sup>26</sup> shifted to the contemporary theorists' obsession with the question of the legitimacy of judicial review. Laurence Tribe's arguments for substantive due process enforcement of fundamental rights,<sup>27</sup> John Hart Ely's promotion of process-perfecting and representation-reinforcing review,<sup>28</sup> Michael Perry's reliance on conventional morality for judicial safeguarding of rights,<sup>29</sup> and Neil Komesar's preference for comparative institutional competence analysis<sup>30</sup> all represent a com-

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25. The phrase "court-positivism" is Professor H. Jefferson Powell's, who used it to take exception to Professor Laurence Tribe for "confining his attention to Supreme Court decisions, law review articles, and occasional actions by the other branches of the federal government" and "treat[ing] the Court's decisions as a given, to be explained, manipulated, and systematized, but criticized only within narrow limits." Powell, *Reaching the Limits of Traditional Constitutional Scholarship* (Book Review), 80 NW. U. L. REV. 1128, 1136 (1986) (reviewing L. TRIBE, *CONSTITUTIONAL CHOICES* (1985)).

In his studies of public law scholarship, both constitutional and nonconstitutional, from the 1930s through the 1980s, Professor Mark Tushnet concludes that most American legal scholars during this period engaged in relatively traditional doctrinal analysis, examining judicial decisions and offering public policy solutions; until the recent emergence of Chicago-style microeconomics and libertarianism among legal scholars, a predominance of "the serious intellectuals among American legal scholars" aligned their policy recommendations with the political program of the Progressive-New Deal tradition. See Tushnet, *Legal Scholarship in the United States: An Overview*, 50 MOD. L. REV. 804, 805-09 (1987) [hereinafter Tushnet, *Legal Scholarship*]; Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC. PUB. TEACHERS L. 20, 22-23 (1980). Moreover, such scholarship focused on jurisprudential issues connected to the growth of the American regulatory-welfare state: "[P]ublic law articles in leading law reviews . . . are the vehicles for continuing efforts to reconcile the regulatory-welfare state with the rule of law." Tushnet, *Legal Scholarship*, *supra*, at 809.

26. Representative of this body of scholarship was the work of Professors William Crosskey, Edwin Corwin, and Herbert Wechsler. See, e.g., W. CROSSKEY, *POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES* 17-229 (1953); Corwin, *The Schechter Case — Landmark, or What?*, 13 N.Y.U. L.Q. REV. 151 (1936); Corwin, *The Child Labor Decision*, NEW REPUBLIC, July 12, 1922, at 177-79; Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 COLUM. L. REV. 543 (1954).

27. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 769-80 (2d ed. 1988); L. TRIBE, *CONSTITUTIONAL CHOICES* 9-28 (1985).

28. J. ELY, *DEMOCRACY AND DISTRUST* (1980).

29. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417 (1977).

30. Komesar, *Taking Institutions Seriously: Introduction to a Strategy for Constitutional Analysis*, 51 U. CHI. L. REV. 366 (1984).

mon enterprise. These liberal scholars strove to create a coherent theoretical basis for the expansive review power of the federal courts.

Similarly, liberal legal scholarship in a more doctrinal mode concentrated largely on individual rights issues and provided analyses to justify the federal judiciary's controversial progressive rulings. Examples are legion: Anthony Amsterdam's article on unconstitutional overbreadth;<sup>31</sup> Charles Black's article on state action and equal protection law;<sup>32</sup> Thomas Emerson's book and articles on first amendment theory;<sup>33</sup> Ruth Bader Ginsburg's article on gender discrimination;<sup>34</sup> Gerald Gunther's article on equal protection law;<sup>35</sup> Yale Kamisar's articles on police interrogation;<sup>36</sup> Frank Michelman's articles on takings and just compensation and on wealth discrimination;<sup>37</sup> Charles Reich's article on the "new property;"<sup>38</sup> and Joseph Tussman's and Jacobus tenBroek's article on the origins of equal protection.<sup>39</sup> These are among the most widely read and influential works of liberal constitutional scholarship over the past forty years.<sup>40</sup>

This sampling of the "classics of legal scholarship"<sup>41</sup> highlights the trends in contemporary liberal constitutional scholarship. These two prototypes — meta-theories of constitutional interpretation and issue-focused doctrinalism — have dominated liberal scholarship and, dur-

31. Amsterdam, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67 (1960).

32. Black, *The Supreme Court, 1966 Term — Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 HARV. L. REV. 69 (1967).

33. E.g., EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1971); Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877 (1963).

34. Ginsburg, *Gender in the Supreme Court: The 1973 and 1974 Terms*, 1975 SUP. CT. REV. 1.

35. Gunther, *The Supreme Court, 1971 Term — Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972).

36. Y. KAMISAR, *POLICE INTERROGATION AND CONFESSIONS* 1-76 (1980) (reprinting several essays on the law of confessions published between 1963 and 1966). Of course, Professor Wayne LaFave's early contributions on fourth amendment law should not be overlooked. See, e.g., W. LAFAVE, *ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY* (1965); LaFave, "Street Encounters" and the Constitution: Terry, Sibron, Peters, and Beyond, 67 MICH. L. REV. 40 (1968) [hereinafter LaFave, *Street Encounters*].

37. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967).

38. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

39. Tussman & tenBroek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949).

40. These pieces figure prominently in the list by rank-order of the most-cited articles published in American law journals from 1947 to 1985. See Shapiro, *The Most-Cited Law Review Articles*, 73 CALIF. L. REV. 1540 (1985).

41. This characterization is attributed to Professor Shapiro, who describes the purpose of his catalogue of most-cited law review articles as "draw[ing] attention to writings that, by virtue of their objectively measured impact, deserve to be called classics of legal scholarship." *Id.* at 1540.

ing the earlier period of liberal courts, endured criticism.<sup>42</sup> If the Reagan appointments to the federal courts herald the beginning of a more conservative court era, what will happen to liberal legal scholarship? Is it realistic to believe that the established prototypes can continue to be politically effective? And, in the absence of judicial endorsement, can they maintain intellectual power?

## II. FRAMING THE AGENDA: THE EMERGENCE OF REACTIVE SCHOLARSHIP<sup>43</sup>

With the advent of a more conservative judicial era, liberal legal scholarship that is directed to the federal courts may no longer be feasible. The first stage of such scholarship in this era is likely to be reactive in character. This suggests two issues: Beyond its loss of dominance in the federal judiciary, how did legal liberalism find itself on the defensive? And, what are the problems with reactive scholarship?

The power to define issues entails the power to structure results. This explains, in part, the functional and normative success enjoyed by liberal public law thinkers over the past four decades. But, by mid-point in this decade, constitutional conservatism assumed a say in legal discourse that was both new and decisive. The presence of this new constitutional conservatism has redefined, to a significant extent, the contemporary constitutional debate, allowing conservatives to define the issues and ultimately to control the results.

Whatever else history may make of former Attorney General Edwin Meese's various broadsides<sup>44</sup> against the liberal constitutional

42. Both prototypes can be, and have been, criticized for irrelevance: doctrinalism is often too narrow and contextualized, and meta-theory too universal and abstract, to be meaningful for living study and practice of constitutional law. See Part IV.C *infra*. The irrelevance of current constitutional law scholarship has occasionally been noticed by liberal scholars themselves. For example, Professor Tribe has asserted that "[m]uch of what constitutional scholars write these days either focuses so closely on constitutional doctrine, or looks to matters so distant from doctrine, as to bear no real resemblance to *doing* constitutional law." L. TRIBE, CONSTITUTIONAL CHOICES x (1985) (emphasis in original). A central objective of Tribe's work is to draw attention to the fact that "constitutional *problem solving* . . . is in less academic vogue nowadays." *Id.*

43. As we use the phrase, "reactive scholarship" is not self-reliant. That is, its forms, concepts, and essential vitality derive from the intellectual framework of its opponents. Moreover, it is not potentially constructive in a visionary sense. Typically, it permits politically or institutionally powerful adversaries to establish the parameters of debate and to define relevant issues, and hence merely responds to their arguments within their constructs. In this commentary, reactive scholarship refers ultimately, though by no means exclusively, to such work by liberals who are reacting to conservative decisional law with which they disagree.

44. Note that many of the Meese speeches referred to in the following footnote were prepared by, or with the substantial assistance of, members of the conservative Center for Judicial Studies, who likewise were active in attempts to rally public opinion behind the former Attorney General's constitutional agenda. See L. CAPLAN, THE TENTH JUSTICE, *supra* note 12, at 97-98,

ethic,<sup>45</sup> these attacks helped conservatism to find its way back onto the stage of American constitutionalism.<sup>46</sup> Prior to this time, the philosophical product of only a small handful of conservative legal thinkers, such as Alexander Bickel, received much attention, and then only at a safe distance. Edwin Meese and his Justice Department, however, changed that situation by “polariz[ing] the debate” on individual rights issues<sup>47</sup> to the point where two liberal Supreme Court Justices, William Brennan and John Paul Stevens, felt the need to offer public responses<sup>48</sup> to the claims and charges made by the legal spokesmen<sup>49</sup> of the New Right. Almost overnight, newspapers, periodicals, and academic journals were filled with “Meese-talk” and seemingly endless liberal responses to it. Throughout it all, the new legal conservatism both increased its ranks and put liberals in the precarious position of taking *public* stands against the interpretative legitimacy of the constitutional text and the framers’ intent — this, while *publicly* deprecating the need to abide by the legislative will of democratic majorities.

Coupled with the former Attorney General’s flamboyant offensive was a more subtle, but nevertheless important, conceptual move. Mr. Meese and his Justice Department had leveled against the liberal legal establishment one significant argument that had already succeeded. In the political arena, the idea had been to depict the “rights revolution” as yet another example of group lobbying for preferential social privi-

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300 n.70. We emphasize this in order to highlight the functional importance of forging bonds between scholars and those in power, a point we develop further in Part IV.A *infra*.

45. For a useful and informative account of the Meese constitutional campaign, see *id.*, at 115-34, 302-05. The former Attorney General’s attacks included challenges to the doctrine of *Cooper v. Aaron*, the incorporation doctrine, the *Miranda* rule, and establishment clause rulings. All of this was capped by Mr. Meese’s call for a return to the doctrine of “original intent.”

46. At least one notable conservative appreciated the philosophically problematic character of the Meese “original intent” argument. See Jaffa, *What Were the “Original Intentions” of the Framers of the Constitution of the United States?*, 10 U. PUGET SOUND L. REV. 351 (1987); see also Jaffa, *Judge Bork’s Mistake*, NATL. REV., Mar. 4, 1988, at 38.

47. Late evidence of this stratagem appeared in a newspaper account of an internal memorandum issued by the Justice Department’s Director of Public Affairs instructing top departmental officials “to ‘polarize the debate’ on issues such as drugs, AIDS and capital punishment.” In one section, the memo described “the importance of associating ‘the search for truth with protecting public safety,’” and added:

If you’re against exclusionary rule reform, or *Miranda* reform, you’re against truth in the courtroom and you’re against public safety. . . . The issues should be defined in these broad public terms, leaving the technical debates for brief writers and legislators. *The purpose is to put the other side on the defensive.*

Marcus, *Justice Dept. Memo: “Polarize the Debate,”* Wash. Post, Feb. 26, 1988, at A4, col. 2 (emphasis added).

48. Brennan, *Addresses — Construing the Constitution*, 19 U.C. DAVIS L. REV. 2 (1985); Stevens, *Addresses — Construing the Constitution*, 19 U.C. DAVIS L. REV. 15 (1985).

49. On many important fronts, Meese was joined in these efforts by Solicitor General Charles Fried, serving on leave from Harvard Law School. In government briefs presented to the Supreme Court, Mr. Fried echoed ideological themes similar to those advanced by former Attorney General Meese. See L. CAPLAN, *supra* note 12, at 115-84, 235-54.

leges. Now, talk of legal rights was equated with "special interest" lobbying of minorities, women, gays, the poor, and labor.<sup>50</sup> The expectation was that such charges would produce in the legal community results similar to those already obtained in the political world.

Indeed, in the political arena, even noted liberal thinkers such as Samuel P. Huntington had argued that the Democratic Party's unyielding commitment to these "special interests" had catastrophically imperiled the liberal cause, as evidenced by the 1984 presidential election.<sup>51</sup> In the face of such *liberal* charges, and given the surface appeal of such arguments, the "special interests" characterization placed a powerful rhetorical club in conservative hands. Not surprisingly, such charges prompted liberal politicians to gravitate more and more towards the right of the philosophical and economic spectrum.<sup>52</sup> It was this trend in the political arena which constitutional conservatives hoped to transport into the legal arena. Liberal legal theorists, too, so the argument ran, must be made to defend their views against charges of parochialism and self-interest.

The momentum generated by conservatives between 1984 and 1987 reached a new high point with President Reagan's nomination of Judge Robert Bork to fill the vacancy created by Justice Lewis Powell's retirement. Judge Bork was correctly seen as the leading intellectual spokesman for the new legal conservatism. Hence, when the Senate rejected the Bork nomination, battered liberalism seemed triumphant in decelerating the new legal conservative agenda.<sup>53</sup> The Bork defeat may be the greatest liberal constitutional victory between Ronald Reagan's assumption of office and the election of the next progressive Democratic President. Still, one must be cautious not to attribute undue significance to this victory. While the former Attorney General and the New Right never succeeded in fully convincing the Court and the nation of the merits of their constitutional campaign, they did manage, nevertheless, to change the judicial climate by more than a few doctrinal degrees. Just as Meese's conservative concept of "original intent" was dismissed as too extreme, the liberal style of "judicial activism" also came to be seen in a new and more critical light.

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50. See Pear, *How Civil Rights Came To Be a "Special Interest,"* N.Y. Times, Jan. 17, 1988, § 4, at 1, col. 3.

51. See Huntington, *The Visions of the Democratic Party*, PUB. INTEREST, Spring 1985, at 63, 65-71. This point is discussed further in Part IV.C.2 *infra*.

52. T. FERGUSON & J. ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* 8 (1986) (tracing the "forces of moderation" in the Democratic party galvanized by the spring of 1985, and led by the Democratic Leadership Council to promote more conservative Democratic candidates).

53. See Dworkin, *From Bork to Kennedy*, N.Y. REV. BOOKS, Dec. 17, 1987, at 36, 42.

However history judges the Reagan Justice Department's constitutional polemics, they may well have been instrumental in creating an atmosphere in the legal community in which federal appellate judges, particularly Reagan appointees, move with more reserve in vindicating rights claims, even legitimate ones.<sup>54</sup>

One of the more apparent signs of the constitutional spectrum's move to the philosophical right was the Senate's characterization of Judge Anthony Kennedy during his confirmation proceedings. Judge Kennedy, "one of the most conservative judges on the Ninth Circuit," came to be seen as "an honorary liberal"<sup>55</sup> by the Senate which unanimously approved him. Thus, the Bork rejection did not portend any new wave of enthusiasm for activist judicial liberalism. In an era in which Anthony Kennedy is viewed as a liberal, liberalism is reduced to respecting only certain core constitutional rights norms. If Justice Kennedy is considered to be "in the mainstream," similar to Chief Justice William Rehnquist and Associate Justices Antonin Scalia and Sandra Day O'Connor,<sup>56</sup> extended applications of rights that come to be seen as logically compelled are not likely to be embraced. And, so far as federal judicial review is concerned, constitutional liberalism will find itself in a holding pattern, largely unable to shape the law in any significant way.

In response to these developments, there is a danger that liberal public law scholars will return to reactive scholarship, similar in principle, though far greater in degree, to the scholarship produced in the early years (1969-1975) of the Burger Court era.<sup>57</sup> Should a more conservative federal judiciary be receptive largely to conservative scholarship, liberal scholars must not limit themselves to reactive scholarship. Rather, they must evolve a reconstructive view, which introduces a future agenda both within and outside of the courts.

Admittedly, the value of scholarly dissent is not to be demeaned. There is and should be a place for such protest,<sup>58</sup> which may help pave

54. For two differing views on this subject, see Fein, *Creating a Better Legal Climate*, Wash. Times, July 11, 1988, § 2, at 1, col. 1; O'Brien, *With P.R. Fanfare, Meese Orchestrates His Own Exit*, L.A. Times, July 10, 1988, § 5, at 3, col. 1.

55. Gallagher, *Here Comes the Judge*, NATL. REV., Dec. 18, 1987, at 33, 60.

56. Ponce, *7 Endorse Kennedy; Opposition Invisible*, Wash. Times, Dec. 22, 1987, at A5, col. 1 (quoting, in part, Arizona Senator Dennis DeConcini).

57. In this regard, consider Professor Leonard Levy's hard-hitting arguments in L. LEVY, *AGAINST THE LAW* (1974). In the same vein, consider Dershowitz & Ely, *Harris v. New York: Some Anxious Observations on the Candor and Logic of the Emerging Nixon Majority*, 80 YALE L.J. 1198 (1971); Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

58. In this regard, consider Belz, *The Civil War Amendments to the Constitution: The Relevance of Original Intent*, 5 CONST. COMMENTARY 115 (1988) (possibility of co-opting "original intent" arguments to advance liberal values). Arguably, a useful strategy for reorienting liberal

the way for the new analytical framework of which legal liberalism is now so sorely in need. In general, the problem is that reactive scholarship is not sufficient. In particular, reactive scholarship is likely to be: (1) conceptually unimaginative; (2) politically and legally ineffective; (3) incapable of critical self-evaluation; and (4) psychologically demoralizing.

Reactive scholarship is conceptually unimaginative because it is bound to the framework of past liberal legal doctrines and theories. Alternatively, liberal scholars should recognize the vital need to develop new constructs. For example, they should look for ways to protect fourth amendment privacy values without speaking only in the language of the exclusionary rule;<sup>59</sup> or, they might try to secure privacy rights and other noneconomic civil liberties without resorting to the troublesome doctrine of "substantive due process."<sup>60</sup>

Moreover, reactive scholarship may be politically ineffective. Generally, when liberals argue for the *extension* of FDR/Warren Court rulings to unforeseen contexts, they are vulnerable to the conservative criticism that yesterday's formulas cannot be squared with today's realities. Take, for example, the principle established in *Douglas v. California*<sup>61</sup> that indigent criminal defendants are entitled to governmentally financed legal assistance in order to guarantee a chance of success at trial reasonably equivalent to that of a nonindigent defendant. Conventional liberal scholarship would view anything short of the full battery of procedural protections as violating the *Douglas* norm of equality. But uncritical adherence to *Douglas* ignores relevant political and economic restraints; the provision of the full battery of procedural protections may be beyond the institutional and economic capability of the government. Although meaningful assistance of counsel and related procedures are desirable, by adhering

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legal scholarship would entail "poking holes" in the conservative claim to a monopoly on logical consistency and judicial constraint. An excellent example of this approach is found in Redish, *Abstinence, Separation of Powers, and the Limits of the Judicial Function*, 94 YALE L.J. 71 (1984).

59. See LaFave, *Street Encounters*, *supra* note 36, at 61 (discussing *Terry v. Ohio* rationale and the exclusionary rule); see also Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247 (1988).

60. See McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34 (revealing intellectual insecurity of dichotomy between economic and noneconomic rights in "substantive due process doctrine"); cf. Davis, *Law, Science, and History: Reflections upon In the Best Interests of the Child*, 86 MICH. L. REV. 1096 (1988).

61. 372 U.S. 353 (1963) (court-appointed counsel on appeal). But see *Ross v. Moffitt*, 417 U.S. 600 (1974) (undermining *Douglas* equality principle). For discussions of these cases, see L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1119 (1978); Kamisar, *Poverty, Equality, and Criminal Procedure: From Griffin v. Illinois and Douglas v. California to Ross v. Moffitt*, in *CONSTITUTIONAL LAW DESKBOOK* 1 (1977).

uncritically to former doctrine, liberal legal scholars continue to ignore relevant political and socioeconomic restraints.<sup>62</sup>

Implicit in these two shortcomings of reactive scholarship is a third, which merits independent emphasis. Reactive scholarship, by its nature, does not invite critical self-evaluation, if only because it is absorbed in defending existent approaches to social justice. Bound to the present, it cannot contemplate a future where the same objectives are obtained by different methods. But, unless they reexamine the weaknesses of liberal legal doctrine and theory, liberal scholars commit themselves to compounding their deficiencies.<sup>63</sup>

Finally, reactive scholarship is likely to be psychologically demoralizing. It tends to be interstitial, gradually making its points to fill the widening gaps created by formidable conservative rulings. As such precedents become more numerous, there is a corresponding, and demoralizing, sense of a loss of alarm. In such a world, reactive scholarship takes on a Sisyphean character.

### III. THE LESSONS OF HISTORY: BEYOND REACTIVE SCHOLARSHIP

If liberal public law thinkers direct their efforts primarily to reactive scholarship, they will perpetuate the single-minded focus on the federal judiciary's development of individual rights. This is the orientation that has characterized liberal legal scholarship in the past four decades. But the emergence of a more conservative judiciary alone demands that liberal scholars reorient their efforts away from a frustrating dialogue with the federal bench and toward some, as yet, unidentified new approaches. The liberal defense of constitutional theories of judicial review and Warren Court doctrine must be supplemented, perhaps reconsidered, by a new agenda. The question is what should be the goals, the agenda, of liberal legal scholarship.

Fortunately, history provides some guidance on these questions, the type of guidance which might serve as a paradigm for reconstructing liberal legal thought. In the face of a conservative stranglehold on national politics from 1876 to 1912, liberal scholars immersed themselves in constitutional politics quite different from today's constitutional scholarship. Liberal scholars then deliberately emphasized the links among constitutional analysis, the regulatory power of govern-

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62. What may be needed, then, is not a defense or extension of the *Douglas* doctrine, but a method to resolve the conundrum of the unequal application of criminal justice. This may have less to do with selecting doctrine than with reforming the overall system of prosecution so that the criminal justice system serves both egalitarian goals and socioeconomic reality.

63. See Part IV *infra*.



mental institutions, and liberal political platforms. They preached a functional constitutionalism that would account for change in the nation's socioeconomic conditions. These scholars challenged federal judicial conservatism in ways that ranged far beyond the reactive. In terms of the nature of their concerns, of the subjects and the audiences that they addressed, and of the methods that they employed, the character of the progressive and early realist public law scholarship provides valuable lessons for tomorrow's liberal constitutionalist.

Epistemologically, it may appear paradoxical to return to the past in order to advance in the future. That is, it may seem incongruous to tap history for new ideas. There is a sense, however, in which the present may shadow the period of constitutional rulings from 1876 to 1937 in American political and legal thought. As developed in greater detail, the historical parallels move along at least two tracks. First, today's conservatives, like their predecessors, have prevailed in most presidential contests since 1970 and dominate the federal judiciary; today's strongest liberal allies are likely to be found in the federal and state legislatures and state courts. Second, the progressive and realist public law scholars demanded a constitutional theory that took account of the socioeconomic consequences of conservative politics; similarly, the next generation of liberal scholars must reform the law to respond to the socially undesirable side effects of "Reaganomics" and the political powerlessness that stems from unregulated concentrations of institutional prerogatives. From this vantage point, cyclical occurrences may justify cyclical stratagems.<sup>64</sup> This is not to suggest that the specific policies supported by progressive and realist scholars are to be implemented "jot for jot" once again. Rather, these earlier liberals followed avenues of scholarship — functional, doctrinal and theoretical — that may be suggestive for contemporary liberals.

The formal coupling of constitutional theory with politics was already evident in the high political discourse of writers in the first half of the nineteenth century. Constitutional analysis in the early nineteenth century was treated as a subset of a greater political philosophical study, an analysis of the appropriate political structures of government.<sup>65</sup> By the end of the century, however, constitutional

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64. See generally M. LERNER, *AMERICA AS A CIVILIZATION* 996-97 (2d ed. 1987) ("The future never returns to the past but incorporates segments of it into its own patterns for its own purposes, whether evolutionary or revolutionary."); A. SCHLESINGER, *THE CYCLES OF AMERICAN HISTORY* (1986).

65. Characteristic of these writings were the works of Francis Lieber, Joseph Story, William Rawle, and James Wilson. See, e.g., F. LIEBER, *ON CIVIL LIBERTY AND SELF-GOVERNMENT* 166 n.1, 213 (Philadelphia 1853); 1 J. STORY, *COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES* 119 (2d ed. Boston 1851); W. RAWLE, *A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA* 16-17 (Philadelphia 1825); J. WILSON, *Commentaries on the Con-*

scholarship emerged, in a rather self-conscious fashion, as an important forum for warring political ideologies. Confronting forty years of conservative national politics and an increasingly influential conservative law school professoriat, liberal legal scholars contributed significantly to the politicization, understood in its salutary sense, of constitutionalism.

The year 1876 marked the end of Reconstruction and the beginning of conservative dominance in federal politics, which continued until the election of Woodrow Wilson in 1912. Accompanying this dominance in national politics was a period of conservative constitutional rulings in the federal courts. From 1876 to 1937, the Supreme Court placed narrow strictures on congressional powers in commerce,<sup>66</sup> taxing,<sup>67</sup> and spending;<sup>68</sup> construed broadly the scope of state economic regulatory powers in the doctrines of economic substantive due process<sup>69</sup> and the "dormant" commerce clause;<sup>70</sup> and stemmed the growth of administrative agency powers in the "nondelegation

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*stitution 1787*, in *SELECTED POLITICAL ESSAYS OF JAMES WILSON* 161, 169-70 (R. Adams ed. 1930). In the antebellum period, legal discussions of the constitutional compact aligned themselves with the contemporary sectional political interests. A worthwhile overview of constitutional scholarship in the first half of the nineteenth century is given in Belz, *The Constitution in the Gilded Age: The Beginnings of Constitutional Realism in American Scholarship*, 13 *AM. J. LEGAL HIST.* 110, 111-13 (1969).

66. Representative of the Supreme Court's constrictive commerce clause rulings were *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895), which imposed serious obstacles to federal regulation of industrial and business monopolies operating in interstate commerce, and *Hammer v. Dagenhart*, 247 U.S. 251 (1918) (invalidating the federal "child labor" law), a reactionary blow to national police power objectives through control of interstate commerce.

67. In one of its most criticized decisions in this period, the Supreme Court nullified a two percent federal tax on incomes over \$4,000 in *Pollock v. Farmers' Loan & Trust Co.*, 157 U.S. 429, *modified*, 158 U.S. 601 (1895), which was heralded by political and economic conservatives as a blow to Populism. This decision was overridden by the sixteenth amendment.

68. In *United States v. Butler*, 297 U.S. 1 (1936), the Supreme Court interpreted the general welfare clause, U.S. CONST., art. I, § 8, cl. 1, to prohibit coercive purchases of compliance with regulations that Congress could not directly command. The decision was effectively overruled by the Court's later cases upholding the Social Security Act. *Helvering v. Davis*, 301 U.S. 619 (1937); *Charles C. Steward Mach. Co. v. Davis*, 301 U.S. 548 (1937).

69. From the time of *Lochner v. New York*, 198 U.S. 45 (1905), until *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), the Supreme Court invalidated much progressive state and federal legislation which it considered intrusive to private economic transactions. Drawing upon notions of natural law and implied common law limitations on governmental police power, the Court frustrated legislative attempts to redistribute economic power and entitlements among private marketplace actors. See COOLEY, *CONSTITUTIONAL LIMITATIONS* 1227-28 (1927); Sunstein, *Lochner's Legacy*, 87 *COLUM. L. REV.* 873, 877 (1987).

70. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851), informed Dormant Commerce Clause doctrine during the following eighty years. The *Cooley* Court upheld the Board's power to require ships entering its ports to employ local pilots because the regulation dealt with local, rather than national, subject matter. 53 U.S. (12 How.) at 319. Subsequent Supreme Court decisions expanded upon the *Cooley* doctrine to justify further state commerce regulation in the "silence" of Congress. See, e.g., *Bowman v. Chicago & N.W. Ry.*, 125 U.S. 465, 482 (1888).

doctrine.”<sup>71</sup>

These and other doctrines found intellectual and scholarly support with the development of the modern state university law school in the 1870s and 1880s, in which the political influence of the American public law scholar grew commensurately.<sup>72</sup> Generally, the constitutional academy and practicing bar gave virtually unqualified support to the conservative position on political and socioeconomic issues. They advocated the virtues of laissez-faire and social Darwinism and disparaged the interests of the labor union and social reform movements. Among the prevailing views of the conservative constitutionalists at the turn of the century, two themes figured centrally. First, they understood the Constitution to be a source of social and political stability and valued its utility in the preservation of the status quo. By measuring and constraining the political authority of the federal government, the Constitution guaranteed cautious and methodical social change. Second, they regarded the Constitution as “formal” law. By judicial (and scholarly) interpretation, it could be translated into absolute and categorical rules and principles, which the federal courts would enforce to protect the contract and property rights that individuals enjoyed as a matter of common law.<sup>73</sup>

In the late 1890s, however, and increasingly in the first decades of the twentieth century, a significant minority of legal academicians abandoned post-Reconstruction conservatism and joined the ranks of liberal political dissent.<sup>74</sup> This distinguished group of scholars furnished the intellectual foundation for the progressive and early realist

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71. In *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935), and *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935), which invalidated two provisions of the National Industrial Recovery Act of 1933, the Supreme Court tightened its application of the traditional “adequate legislative standards” rule for the doctrine of delegation of congressional powers. The Court’s curtailment of Congress’ authority to delegate its expanding economic regulatory powers was short-lived. *Panama Refining* and *Schechter Poultry* remain the only two cases in the nation’s history that have invalidated federal statutes on nondelegation grounds.

72. At the turn of the twentieth century, professors became an independent force within the legal profession. As Professor Richard Hofstadter describes, “[i]n the movement for broader conceptions of professional service, for new legal concepts and procedural reforms, for deeper professional responsibility, for criticism of the courts, the teaching side of the profession now became important. The teachers became the keepers of the professional conscience and helped implant a social view of their functions in the young men who graduated from good law schools.” R. HOFSTADTER, *THE AGE OF REFORM* 158 (1955).

73. Prominent among the conservative scholars of this era were Thomas M. Cooley and Christopher Tiedeman, whose work celebrated the stabilizing forces of the American Constitution and its protection of individual common law liberties. See generally T. COOLEY, *THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA* (3d ed. 1898); T. COOLEY, *A TREATISE ON CONSTITUTIONAL LIMITATIONS* (6th ed. 1890); C. TIEDEMAN, *THE UNWRITTEN CONSTITUTION OF THE UNITED STATES* (1890).

74. For a general account of the gradual alienation of the intellectual and legal professional classes from the conservative politics of the 1870s and 1880s, see R. HOFSTADTER, *supra* note 72, at 148-64 (1955).

legal movements.<sup>75</sup>

Among the earliest liberal critics, a few public law theorists challenged the two dominant themes in conservative constitutionalism. First, they demeaned the view of the Constitution as a stabilizing force that would rein in federal regulatory powers. These scholars argued that the government's construction of its own authority, denoted in the notion of its "latent powers," effectively enlarged the roles of the federal governmental branches, particularly when emergency or expediency justified political action. They claimed that the conservative account of the constitutional document blurred past practices and current realities of the political system.<sup>76</sup> Second, other writers, primarily legal historians,<sup>77</sup> spurned the concept of the "formal" Constitution. They emphasized the connection of constitutional law and politics and promoted an understanding of the Constitution that would examine and describe the functioning framework of political machinery: congressional committee systems, the electoral college, and the political party organizations. According to one scholar among them, then-Professor Woodrow Wilson, constitutional study must focus upon the actual practices of the Constitution and concern the "real depositaries and the essential machinery of power."<sup>78</sup>

75. A list of the most prominent "anti-formalist" legal critics, who rejected the concept of law as the rule of fixed doctrinal principles, would include Oliver Wendell Holmes and Roscoe Pound among the progressive writers of the late nineteenth and early twentieth centuries; and Thurman Arnold, Felix Cohen, Walter Wheeler Cook, William O. Douglas, Jerome Frank, Felix Frankfurter, James Landis, Max Lerner, Karl Llewellyn, Underhill Moore, Edmund Morgan, Herman Oliphant, Thomas R. Powell, and Hessel Yntema among the early realist scholars of the 1920s to 1940s. See R. HOFSTADTER, *supra* note 72, at 154; L. KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 4-66 (1986).

During the same period, the attack on formalism as a system of thought was carried on outside of the legal academy by political and social scientists who advocated "functionalism," the understanding of objects and ideas in terms of their factual contexts and socioeconomic consequences. Notable figures include John R. Commons, Richard T. Ely, Walter Hamilton, E.R.A. Seligman, and Thorstein Veblen in economics; Charles A. Beard, Arthur F. Bentley, Frank Goodnow, Charles Merriam, and J. Allen Smith in history and political science; C.H. Cooley, E.A. Ross, Albion Small, and Lester Ward in sociology; and James R. Angell and John Dewey in philosophy and psychology. R. HOFSTADTER, *supra* note 72, at 154; L. KALMAN, *supra*, at 14-17.

76. See, e.g., 1 H. VON HOLST, *THE CONSTITUTIONAL AND POLITICAL HISTORY OF THE UNITED STATES* (1892); H. FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS: A SKETCH OF CONSTITUTIONAL DEVELOPMENT* (1898), discussed in Belz, *Beginnings*, *supra* note 65, at 117-19.

77. The writings of the reformer Simon Sterne and legal historians J. Franklin Jameson and Henry J. Ford were seminal in infusing constitutional study with an understanding of the conditions and workings of American political institutions. See *ESSAYS IN THE CONSTITUTIONAL HISTORY OF THE UNITED STATES* (J. Jameson ed. 1889); H. FORD, *THE RISE AND GROWTH OF AMERICAN POLITICS: A SKETCH OF CONSTITUTIONAL DEVELOPMENT* (1898), discussed in Belz, *Beginnings*, *supra* note 65, at 120-23; S. STERNE, *CONSTITUTIONAL HISTORY AND POLITICAL DEVELOPMENT OF THE UNITED STATES* (1882).

78. W. WILSON, *CONGRESSIONAL GOVERNMENT: A STUDY IN AMERICAN POLITICS* 30 (1956).

Nevertheless, by the turn of the century, conservative federal judicial supremacy had become well-entrenched. With the leading members of the bar advocating the interests of the propertied and corporate classes, the federal judiciary had transformed economic and political arguments against governmental interference with private enterprise into constitutional limitations.<sup>79</sup> Accordingly, liberal challenges to the legitimacy of judicial review of congressional and state legislative socioeconomic regulations increasingly preoccupied liberal legal commentary. Criticism of the excesses in federal judicial authority, which usurped the power of popularly elected legislatures, became one of the central causes of the early realist public law scholars.<sup>80</sup>

The link between constitutionalism and liberal democratic politics was solidified by legal realism in the first decades of the twentieth century. In effect, the legal realists advanced the assault on the two dominant themes in conservative constitutionalism that the earlier progressive scholars had initiated. Regarding the first theme, for the realist critic, the Constitution was not prescriptive; it could not serve to limit the regulatory purposes or means for federal legislative and executive power. Rather, the Constitution was primarily descriptive; it established and arranged the channels in which governmental power flowed.

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79. See generally F. STRONG, *SUBSTANTIVE DUE PROCESS OF LAW: A DICHOTOMY OF SENSE AND NONSENSE* 95-102 (1986); B. TWISS, *LAWYERS AND THE CONSTITUTION* 130-38 (1942).

80. Important early realist critiques of the politically conservative character of the federal judiciary include C. BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES* (2d ed. 1935); J. SMITH, *THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT* (1930); J. SMITH, *THE SPIRIT OF THE AMERICAN GOVERNMENT* (1907). In Professor J. Alan Smith's view, the fiction of the "reign of law" served "as a mask" for irresponsible conservative politics wielded by the federal judiciary, which could only be controlled by critical political action. J. SMITH, *THE GROWTH AND DECADENCE OF CONSTITUTIONAL GOVERNMENT* 149. Alluding to the work of these constitutional scholars, V.L. Parrington commented that the chief contribution of the progressive and early realist movement to American political thought was "its discovery of the essentially undemocratic nature of the federal constitution." R. HOFSTADTER, *supra* note 72, at 200-01. Professor Morton Horwitz describes the program of the progressive and early realist scholars as an effort to "delegitimize the anti-redistributionist picture of the neutral state" by exposing the substantive premises underlying the existing constitutional law doctrine: freedom of contract sanctioned vastly unequal market power among bargaining parties; the distinction between public and private realms of action protected growing cartelization in the private economic realm; and, such disparities in wealth and power undermined any real opportunity for a vital, effective democracy. See Horwitz, *History and Theory*, 96 *YALE L.J.* 1825, 1828-29 (1987) [hereinafter Horwitz, *History and Theory*]; Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 *WM. & MARY L. REV.* 57, 61 (1987) [hereinafter Horwitz, *Republicanism and Liberalism*].

The two most prominent works of constitutional history that consolidated the achievements of thirty years of progressive and early realist legal scholarship were L. BOUDIN, *GOVERNMENT BY JUDICIARY* (1932), and C. HAINES, *THE AMERICAN DOCTRINE OF JUDICIAL SUPREMACY* (2d ed. 1932) (attacking the "despotism" of an incremental assertion of federal judicial power that defended a conservative socioeconomic order at the expense of the legitimate authority of the popularly elected legislative and executive branches).

The constitutionalism of the realist public law scholars was fundamentally political and sociological. They transcended the orthodox study of legal texts and traditions; they acknowledged the social realities that shaped legal decisions and the ways in which realities were shaped, in turn, by legal decisions. The legal historian Herman Belz describes the intellectual mission of the early twentieth-century constitutional scholars as the exposition of the "constitution as a dynamic political process:"

[R]ealist critics after 1900 studied the interaction between law and politics with special reference to the forces that motivated constitutional change. This search ultimately led them to consider the nature and effect of constitutionalism itself. Given their disposition to reform, they viewed existing constitutional arrangements as the result of men responding to specific political pressures and concrete economic forces, rather than the necessary outcome of reliance on right principles of political science. . . .

This insertion of social and economic forces into the foreground of historical analysis was the principal development in constitutional studies during the era of reform.<sup>81</sup>

Moreover, for the realist scholar, the Constitution and the common law had importance, not in themselves, but because of the democratic social values and purposes that they enforced.<sup>82</sup> A dominant argument of the realist critique was the antimajoritarian and incomplete character of constitutional and common law rights. The realists understood the constitutional and common law systems as instruments of politics, regulatory schemes through which government ordered private economic and social entitlements.<sup>83</sup> The experience of the Great Depression demonstrated the insufficiency for national economic welfare of the laissez-faire objectives of the common law, which privileged the existing distribution of market power and wealth. The realist approach permitted the restructuring of constitutional and common law doctrines<sup>84</sup> so that federal and state socioeconomic reforms during the New Deal might "reshuffl[e] . . . the cards, from

81. Belz, *The Realist Critique of Constitutionalism in the Era of Reform*, 15 AM. J. LEGAL HIST. 288, 293, 295 (1971).

82. The school of legal realism generally understood the common law as a system of governmental intervention to regulate social interests. See, e.g., Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927). This recognition was particularly powerful in the era of economic substantive due process, in which constitutional restraints on governmental power were shaped by common law rights. See Sunstein, *supra* note 69; L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 562-67 (2d ed. 1988).

83. See Cohen, *supra* note 82; Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 478-81, 493 (1923).

84. For an analysis of the stages in the evolution of federal doctrine that permitted the post-1937 expansion of Congress' socioeconomic regulatory powers, see Skover, *"Phoenix Rising" and Federalism Analysis*, 13 HASTINGS CONST. L.Q. 271, 281-84 (1986).

which a different distribution of benefits and burdens would result.”<sup>85</sup>

As to the second conservative theme, realism, at its core, revolted against the conservative notion of the Constitution as “formal” law. Constitutional decisionmaking by *a priori* reasoning was disparaged; for the realists, decisionmaking required investigation of empirical fact and evaluative opinion.<sup>86</sup> Instead of articulating the principles of right and justice that should restrain judicial discretion, constitutional scholarship should unmask the socioeconomic forces that influenced lawmaking and encourage the judiciary to take account of the interplay of these forces in rulemaking.<sup>87</sup> From this perspective, the celebrated “Brandeis brief”<sup>88</sup> was a weapon of realist constitutionalism; it responded to the call for a jurisprudence based less on constitutional text than on constitutional interests, less on legal principle than on social consequences of legal action.

The liberal legal scholarship of the progressive and realist eras had a decisive effect on the more orthodox constitutionalists. Many important proponents of traditional constitutionalism during the progressive era were sympathetic to the reform positions and critical of the conservative ideology of the federal judiciary. Although ultimately devoted to the regime of objective and rational legal principles, they recognized that knowledge of the workings of political institutions was important to sound judicial rulemaking.<sup>89</sup>

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85. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 437-38 (1987) (the realist attack on the inadequacies of the common law system of economic rights vindicated in the collapse of the common law market system during the Great Depression).

86. See, e.g., Biklé, *Judicial Determination of Questions of Fact Affecting the Constitutional Validity of Legislative Action*, 38 HARV. L. REV. 6, 7-8 (1924); Denman, *Comment on Trials of Fact in Constitutional Cases*, 21 A.B.A. J. 805 (1935).

87. See, e.g., F. GOODNOW, *POLITICS AND ADMINISTRATION* 17-18 (1900) (social reform requires governmental agencies and courts to understand that application of the Constitution must take into account changing social conditions); Bigelow, *The Extension of Legal Education*, in *CENTRALIZATION AND THE LAW* 3 (1906) (legal rules and standards are the result of conflicting social forces), discussed in Belz, *supra* note 81, at 294.

88. Representing the State of Oregon, Louis Brandeis defended the constitutionality of a law imposing a ceiling on daily work hours for women in *Muller v. Oregon*, 208 U.S. 412 (1908), in which he submitted an unconventional brief that presented empirical and authoritative evidence from numerous sources to demonstrate the detriment of long working hours on the health and safety of women. The term, “Brandeis brief,” refers to a legal argument that is grounded, not in traditional doctrinal analysis, but in empirical evidence. On the “Brandeis brief,” see P. FREUND, *ON UNDERSTANDING THE SUPREME COURT* 86-92 (1949); Collins & Friesen, *Looking Back on Muller v. Oregon* (pts. 1 & 2), 69 A.B.A. J. 294, 472 (1983); Karst, *Legislative Facts in Constitutional Litigation*, 1960 SUP. CT. REV. 75.

89. Among the most influential of traditional constitutionalists in this era were Edwin S. Corwin and Andrew C. McLaughlin, whose writings were quite evidently influenced by the legal realists of the 1920s and 1930s. See 2 E. CORWIN, *ON THE CONSTITUTION: THE JUDICIARY* (R. Loss ed. 1981); A. McLAUGHLIN, *THE FOUNDATIONS OF AMERICAN CONSTITUTIONALISM* (1932).

Several of Corwin’s essays are instructive in their reflection of the teachings of the legal progressives and realists. In *Constitution v. Constitutional Theory: The Question of the States v.*

During the New Deal and the Warren Court eras, the realist approach lost ground to the call for a more traditional doctrinal defense of an activist and socially progressive federal judiciary. Although ultimately the movement gave way to the current mode of liberal constitutional jurisprudence, the progressives and realists served a valuable function in their time. They broke the conservative intellectual barriers to a liberalism that would revitalize constitutional government with political action.<sup>90</sup> If the lessons of the progressives and realists are studied carefully,<sup>91</sup> they can serve an equally valuable function in our time. Such lessons can furnish a framework for answering the question facing contemporary liberal scholars: If the federal judiciary will be less responsive to liberal values, about what and to whom should the liberal direct his or her scholarship?

The example of the progressives and realists suggests that at least two tasks face liberal legal scholars. First, they need to open a dialogue with liberal political actors. Second, they need to reexamine the theoretical constructs supporting contemporary liberal legal

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*the Nation*, Corwin recognizes that "[a] full explanation of the growth of American constitutional law must recognize that the relatively compact universe of constitutional theory is bathed in a vastly wider atmosphere of social and economic activity, athwart which are constantly blowing the winds of change, set loose no man knows how." E. CORWIN, *Constitution v. Constitutional Theory: The Question of the States v. the Nation*, in 2 ON THE CONSTITUTION: THE JUDICIARY, *supra*, at 190. Consider also Corwin's statement of the function of constitutional review:

[I]n the constitutional field the Court is a *legislature*; and to the extent that the doctrine of the finality of its interpretations of the Constitution actually prevails, it is a *super-legislature*.

... [I]f the Court is to retain its power of judicial review, it must adjust that power to the underlying popular character of our political institutions, and hence must adopt a sympathetic attitude toward clearly established contemporary needs and opinion.

E. CORWIN, *Standpoint in Constitutional Law*, in 2 ON THE CONSTITUTION: THE JUDICIARY, *supra*, at 294-95.

90. Professor Belz understands the objective of the constitutional realists, like J. Allen Smith, Boudin, and Haines, as intrinsically political: they aimed to "energiz[e] the government to make it responsive to social needs and accountable to the popular will."

Constitutional realists thus hoped to infuse American constitutionalism with a new content of positive, responsible government. By the start of the 1930s their critique of traditional constitutionalism helped provide the intellectual framework for the constitution of powers that the New Deal created.

Belz, *supra* note 81, at 306.

91. Professor Morton Horwitz incisively observes that, for the past fifty years, constitutional historians have characterized the jurisprudential debate between the camp of Progressives and New Dealers and the early twentieth-century opponents to redistributionist policies as a dispute over "disembodied institutional ideas of legislative power and judicial restraint, not over law as the embodiment of substantive visions of the good society." Horwitz suggests that this misimpression accounts in part for the fact that today's prominent conservative legal thinkers "have returned virtually unchallenged to *Lochner* Court assumptions": "We have gradually lost touch with the reasons why the idea of a neutral state was incoherent and depended on unsupportable background assumptions about the relationships between state and society, public and private law, freedom and coercion, rights and duties." Horwitz, *History and Theory*, *supra* note 80, at 1830.



thought.<sup>92</sup> These suggestions already point in the direction of some future avenues for reconstructive criticism. The lessons of yesterday's liberal theorists encourage tomorrow's liberal thinkers to move beyond reactive scholarship.<sup>93</sup>

#### IV. FUTURE LIBERAL LEGAL SCHOLARSHIP: THREE AVENUES FOR RECONSTRUCTIVE THOUGHT

##### A. *Functional Scholarship: Focus on Law and Politics*

One avenue for reconstructive thought in which liberal public law scholars might channel their efforts involves the study and promotion of national and state reform legislation. Given their preoccupation with federal decisional law bearing on constitutional issues, these scholars have devoted little attention to the political lawmaking arenas.<sup>94</sup> Unlike an earlier generation of scholars writing within or outside<sup>95</sup> of public law,<sup>96</sup> contemporary liberal scholars have not demonstrated a real confidence in the capacity of legislative bodies to safeguard civil liberties.

Yet, attention to liberal legal reform scholarship is important and necessary for at least five reasons. First, reform legislation may offer liberals the most viable opportunity for affecting the direction of public law.<sup>97</sup> Second, reform legislation scholarship helps to bridge the

92. A similar call has been made to conservative scholars. See, e.g., Mansfield, *Pride versus Interest in American Conservatism Today*, 22 GOVT. OPPOSITION 194 (1987).

93. When this commentary was nearly completed, a notable symposium on constitutional scholarship was published. Some ideas advanced in that symposium's "short responses" bear on our discussion. See *Constitutional Scholarship: What Next?*, 5 CONST. COMMENTARY (1988) 17, 28-32 (Tushnet), 38-42 (Hall), 48-50 (Brubaker), 57-61 (O'Brien), 67-68 (Frickey), 73-76 (Bryden).

94. In another work, we offer a "constitutional profile" of a leading national lawmaker. See Collins & Skover, *The Senator and the Constitution: An Interview with Orrin G. Hatch* (forthcoming).

95. See generally Braucher, *Federal Enactment of the Uniform Commercial Code*, 16 LAW & CONTEMP. PROBS. 100 (1951); Corbin, *The Uniform Commercial Code — Sales: Should It Be Enacted?*, 59 YALE L.J. 821 (1950); Llewellyn, *Why We Need the Uniform Commercial Code*, 10 U. FLA. L. REV. 367 (1957); Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A. J. 419 (1950).

96. See, e.g., J. HURST, *THE GROWTH OF AMERICAN LAW: THE LAW MAKERS* 23-81, 237-46 (1950). For a notable, albeit modern, analysis of this general subject, see Eskridge & Frickey, *Legislation Scholarship & Pedagogy in the Post-Legal Process Era*, 48 U. PITT. L. REV. 691, 693, 709-10, 716-19, 724-25 (1987); see also Ross, *Legislative Enforcement of Equal Protection*, 72 MINN. L. REV. 311, 335-45 (1987).

97. See Hey, *Liberalism on Social Issues Again in Vogue on Capitol Hill*, Christian Sci. Monitor, June 10, 1988, at 7, col. 1.

For example, over the veto of President Reagan, the Congress recently expanded the reach of federal civil rights laws to reverse the effects of the Supreme Court's restrictive ruling in *Grove City College v. Bell*, 465 U.S. 555 (1984). By a vote of 73 to 24 in the Senate and 292 to 133 in the House, the Congress passed the Civil Rights Restoration Act, which applies federal anti-discrimination statutes to a private institution in its entirety if any department of the institution

gap between liberalism and majoritarianism, thus fortifying the link between liberal law and liberal politics. In this regard, Michael Kinsley of the *New Republic* has observed, "[g]etting hooked on judicial policy making is probably the biggest mistake of postwar liberalism."<sup>98</sup> As a corrective, liberal legislative reform scholarship could provide at the very least a salutary corollary to rights-affirming, antimajoritarian forms of judicial review as well as a healthful antidote to those forms that run counter to the liberal ideal.

Third, such scholarship is needed to fill the vacuum created by the mass of individual rights decisional law which has replaced systematic legislative solutions to a variety of social problems.<sup>99</sup> Fourth, legislative reform scholarship need not characterize an interest sought to be protected as "fundamental" before arguing that the government is obligated to take some affirmative action. That is, such scholarship is premised on the notion that individual and group interests can be important even if they do not rise to the level of core constitutional rights dependent on judicial protection.

Finally, broad reform legislation scholarship is vital if a multitude of socioeconomic problems such as health care, joblessness, urban development, pollution, and poverty and the criminal justice system are to be addressed. These interests, important as they are, do not easily

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accepts federal aid. Molotsky, *House and Senate Vote to Override Reagan on Rights*, N.Y. Times, Mar. 23, 1988, at 1, col. 6.

By way of another example, Congress has sharply restricted pre-hiring polygraph screening and random testing by private employers. Karr, *Law Limiting Use of Lie Detectors Is Seen Having Widespread Effect*, Wall St. J., July 1, 1988, at 19, col. 4; *Ban on Most Uses of Polygraph Tests Clears Congress*, Wall St. J., June 10, 1988, at 31, col. 3.

Finally, should the U.S. Supreme Court overrule or retreat from its prior ruling in *Runyon v. McCrary*, 427 U.S. 160 (1976), civil rights lobbies certainly would resort to Congress for an amendment to the post-Civil War civil rights acts that would overturn any such decision. See Kamen, *Liberals Uneasy Over High Court Review of Discrimination Laws*, Wash. Post, May 1, 1988, at A4, col. 1; see also La Marche, *supra* note 20, at 14 (rights-affirming bills under consideration in Congress).

98. Kinsley, *A Democrats' Guide to Robert Bork*, Wall St. J., July 9, 1987, at 29, col. 3. On a related point, Stuart Taylor Jr. has pointed to the "poignant spectacle of 'elected senators . . . feeling . . . pressure to reject a nominee whose philosophy rests on the premise that legislators should make the laws.'" *Id.* (omissions in original); see also Lerner, *Wrong Champion, Wrong Enemy, Wrong War*, Wash. Times, July 10, 1987, at D5, col. 6 ("the defense of liberal judicial activism is the wrong banner of judicial semantics for Democrats to follow, whether in 1988 or in any future year").

99. See, e.g., Greenhouse, *What's a Lawmaker To Do About the Constitution?*, N.Y. Times, June 3, 1988, at B6, col. 3. In commenting on the Congress' consideration of constitutional questions relating to the Ethics in Government Act of 1978, former Representative Abner Mikva related that, far from having formed a judgment about the constitutionality of the bill when he voted for it, he had paid almost no attention to the issue: "That's not the way it ought to be, but that's the way it almost always is." *Id.*

Legislative abdication of constitutional responsibility is particularly evident in the area of criminal justice. State legislatures have virtually abandoned efforts to regulate police conduct, deferring rather to the Supreme Court to develop the law in this area on an ad hoc basis.

lend themselves to federal judicial review and constitutional resolution. Such problems represent the "unwelcome side effects" of America's socioeconomic progress in the twentieth century.<sup>100</sup> Liberal legal scholars betray the cause of liberalism if they either neglect discussion of such issues or confine their analysis to constitutional discourse dependent on the current status of decisional law.

If it is to be meaningful and effective, however, liberal legal scholarship directed towards substantive and procedural legislative reforms must establish a context in which its proposals can be realized. This means that there must be a bridge between liberal legal scholarship and liberal politics.

The contemporary emphasis on federal judicial review has heightened the tension between liberal legal scholarship and liberal politics; that is, the tension between the antimajoritarian principles of the former and the majoritarian influences of the latter. This tension should not exist. Contrary to contemporary wisdom, the Bill of Rights is not, except for the first amendment, a minoritarian credo. Rather, it protects the interests of the entire citizenry from governmental abuses of power. This purpose is undermined when liberal legal scholars treat the Bill of Rights axiomatically as pitting its values against majoritarian interests. For example, liberals are largely responsible for the misimpression that the sole constituency protected by the fourth amendment is the criminally accused.<sup>101</sup> Liberal scholars would do well to consider the extent to which their characterization of protections against government strikes a responsive chord with the general public.<sup>102</sup> Unless this is accomplished, the conflict between liberal politics and the liberal rights enterprise is not likely to be resolved.

Another reason the link between liberal legal scholarship and liberal politics has not been fortified is that contemporary political liber-

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100. Reich, *Constitutional Transformation: New Wrongs, New Rights*, U.S.F. L. REV. (forthcoming) (1988). We do not necessarily take issue with Professor Reich's suggestion that, given contemporary problems associated with industrialization and modernization, the spectrum of constitutional rights may (and perhaps should) expand in the future. To some extent, particularly in the area of vital health care, new applications of constitutional protection may be warranted (e.g., the fifth and fourteenth amendments' protection of "life"). Nevertheless, we do maintain that, for a variety of reasons, liberal legal scholars should not focus all or even most of their attention on judicial constitutional intervention to the exclusion of reform legislation scholarship.

101. *But see* Meltzer, *supra* note 59.

102. For example, individual rights discourse should be *prefaced* with an inquiry into the legislative authorization for executive or administrative action. Unless such authorization is present, the state may be held to have exceeded its law enforcement powers. By demanding a correspondence between legislative authorization and government action, liberal legal scholars can better ally their interests in protection of rights with the popular will as defined by the legislature. *See infra* note 187.

alism is intellectually stale. As the pollster Patrick Cadell observed: "The Democratic Party cannot afford four more years of intellectual stagnation. . . . It cannot hope to be successful at the national level if it is unable to restore its primacy as the party of ideas."<sup>103</sup> Although in the 1984 presidential election liberals crusaded on a platform of supposedly "new ideas" (as they also have in 1988), "[i]n the end, the chief architect of the Democratic campaign was again Franklin Roosevelt. . . . There was, of course, one other dominant figure in Democratic thinking and campaigning in 1984 — the opponent, Ronald Reagan."<sup>104</sup> This paucity of ideas has left liberal political thinkers in a reactive posture, responding predictably to the agenda set by the New Right. Thus the problem for these liberal political thinkers was both their unwillingness to accept innovations which challenged the FDR policies for implementing traditional liberal values and their inability to forge innovative proposals of their own. Contemporary political liberalism had grown fat on the thinking of its predecessors, while conservative Republicans usurped their hegemony as the "party of ideas."<sup>105</sup>

Part II of this commentary demonstrated that a similar pattern is manifesting itself in the area of public legal scholarship. Here, too, conservative legal thinkers, ranging from jurists and government officials to academicians, are increasingly setting the public law agenda by appealing to a new (or newly packaged) code of constitutional ideas. And here, too, liberal legal theorists have either resorted to the FDR/Warren Court legal catechism, or else they have assumed a reactive analytical posture. Caught in a dual struggle to develop their own sense of direction on the one hand, and to fend off the onslaught of the "new conservatism" on the other, liberal political thinkers have been unable to reinforce their ties to the liberal legal community.

If liberalism is to regain a preferred status in American politics and jurisprudence, its defenders must commit themselves to a change, not of ideals, but of ideas. Among other things, the establishment of new liberal "think centers" may be capable of ushering in the kind of intellectual enthusiasm which the Brookings Institution gave to the John-

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103. R. REEVES, *THE REAGAN DETOUR* 42 (1985) (omission in original).

104. *Id.* Despite such references to the Democratic Party, the arguments advanced here and throughout the commentary may apply to all "liberals," as we understand the term, regardless of party affiliation. See note 24 *supra*.

105. R. REEVES, *supra* note 103, at 32 (quoting New York Senator Daniel Patrick Moynihan).

son Administration.<sup>106</sup> The legal and political proposals developed in these new centers need to be conceptually sound, operationally viable, and rhetorically persuasive.<sup>107</sup> Similarly, there need to be liberal scholarly associations akin to the influential and conservative Federalist Society, which has linked both students and scholars to government policymakers and federal judges.<sup>108</sup> Finally, the liberal legal and political communities are in dire need of periodicals willing to break a new lance for alternative approaches to societal ills. In the past, such periodicals have offered a vital forum for the exchange and distribution of ideas and programs in furtherance of liberal values.<sup>109</sup>

### B. *Doctrinal Scholarship: Focus on the Development of State Law*

A second avenue for reconstructive thought to which liberal legal scholars may direct their attention is the independent development of state constitutional and common law. It should be remembered that decentralization was not an idea invented by the Reagan Administration. At least since 1970, the Burger Court was doing its share to move American law out of federal courtrooms. This trend was most apparent in the federal constitutional areas of standing, sovereign immunity, abstention, and habeas corpus. The Court took a similar posture with the governance of its certiorari policy, one decisively sympathetic to government claims.<sup>110</sup> Likewise, the Burger and Rehnquist Courts, though not reactionary, have tried to put a halt to the criminal justice revolution championed by the Warren Court. And there are no signs that this trend will abate.

One of the benefits of judicial decentralization has been the revitalization of state law as an independent source of checking government

106. "Brookings was part of the intellectual base of the 'Great Society.'" R. REEVES, *supra* note 103, at 28.

There need to be new liberal counterparts to conservative "think tanks" such as the Heritage and Free Congress foundations, the Hoover, American Enterprise, and Cato institutes, and the Center for Judicial Studies. For a discussion of the role played by these organizations, see T. FERGUSON & J. ROGERS, *supra* note 24, at 86-88, 104-05, 133, 144, 198 (noting, among other things, funding sources); R. REEVES, *supra* note 103, at 23-32.

107. Cf. R. REEVES, *supra* note 103, at 26-27 (describing classifications of political and governmental "ideas" suggested by Professors James Q. Wilson and Robert Reich).

108. See Abramson, *Right Place at the Right Time*, AM. LAW., June 1986, at 99; see also *A Night with Young Conservatives*, N.Y. Times, Aug. 11, 1987, at 16, col. 4 (noting formation of new young conservative group called the "Third Generation").

109. See R. PELLIS, *THE LIBERAL MIND IN A CONSERVATIVE AGE* 380-92 (1985); see generally D. SEIDEMAN, *THE NEW REPUBLIC: A VOICE OF MODERN LIBERALISM* (1986). Already, some such liberal periodicals are emerging. For examples of these, see *New Perspectives Quarterly* (discussed in Hendrix, *A Place for Ideas That Won't Fit on Bumper Stickers*, L.A. Times, Dec. 30, 1987, § 5, at 1, col. 5), *Tikkun Magazine*, and *Constitutional Commentary*.

110. See, e.g., Welsh, *Whose Federalism? — The Burger Court's Treatment of State Civil Liberties Judgments*, 10 HASTINGS CONST. L.Q. 819 (1983).

abuses. As access to the federal courts was thwarted, and as the Court became less sympathetic toward certain rights claims, state high courts assumed a more prominent position as harbors for constitutional claimants. During the early period of the state constitutional law "counter-revolution" (1970-1977), independent reliance on state law was largely confined to criminal justice cases. Toward the end of the 1970s, the emphasis on state law also became apparent in privacy cases and in equality of treatment cases involving issues such as school financing and gender discrimination. The momentum of the "new judicial federalism" continued on into the 1980s with state high courts going beyond federal minimums in areas as diverse as abortion funding, access to courts and public fora, zoning, and various forms of economic liberty. By the close of 1987, state high courts had invoked their own constitutional law in some 450 cases in which the relief granted would have been unavailable under the federal Constitution as interpreted by the Supreme Court.<sup>111</sup> Moreover, the "new judicial federalism" of the late 1980s, unlike its predecessor, is no longer confined to a handful of Western and Atlantic Coast states.<sup>112</sup>

Justice William Brennan has referred to the state constitutional law movement as "the most significant development in American constitutional jurisprudence today."<sup>113</sup> And as evidenced by the more than 300 law review articles generated on the subject between 1970 and 1986,<sup>114</sup> this development has not gone unnoticed in academia. Unfortunately, most of the literature, like many of the state cases themselves, offers more in terms of approval and encouragement than of analytical insight and innovation. The states were spurred on to become the depositories of discarded federal rights doctrines as defended by dissenting Supreme Court justices. While not inherently suspect, this approach must be questioned for at least two reasons. First, it renders independent reliance on state law vulnerable to the criticism that its use is ad hoc and result-oriented, and thus unprincipled. This criticism has won, and is likely to continue to win, some approval not only in the academic literature, but also at the state polling booths. Second, reactive use of state law has typically been premised on arguments advanced *within* the analytical framework of current federal decisional law. More attention must be devoted to *new*

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111. Trends and figures in the text are based on an update of the data in Collins & Galie, *State Constitutional Law*, Natl. L.J., Sept. 29, 1986, at S-9.

112. In 1987 alone, more than twenty different state high courts invoked their own law to go beyond federal decisional law minimums (study on file with the authors).

113. Brennan, *Symposium on the Revolution in State Constitutional Law — Foreword*, 13 VT. L. REV. 11 (1988).

114. See note 111 *supra*.

conceptualizations in constitutional doctrine.<sup>115</sup>

Unquestionably, an even greater number of state courts will take refuge in local law if the Rehnquist Court continues its move to the right. This movement can be expected to continue into the next decade.<sup>116</sup> But the revitalization of state law can only be fully actualized if, at the outset, liberal legal thinkers develop new state law constructs of freedom of expression, equality of treatment, and procedural and substantive forms of fairness. Just as scholars such as Anthony Amsterdam, Ruth Bader Ginsburg, Gerald Gunther, and Charles Reich once presented the federal courts with innovative conceptions of fundamental fairness, such efforts must now be directed to the state courts. That it is possible to erect new, "ground-up" theories of constitutionalism is apparent from the exciting experiment presently being conducted in Oregon where new approaches to issues ranging from free speech to criminal justice are emerging.<sup>117</sup> Such theories need not be state-specific. Rather, models of state-law-based arguments should be fashioned which are widely adaptable to the texts of state bills and declarations of rights.

Innovative state law arguments, however, depend significantly upon reform in the law schools' constitutional law curricula. Incredibly, most of the nation's law schools continue to ignore the burgeoning developments in state constitutional law and individual rights. This may be less surprising if it is understood that today's casebook authors are, by and large, Warren Court protégés. The federal law bias in current constitutional law texts not only fosters a distorted view of American constitutionalism, but also reinforces litigation habits characteristic of an earlier era confronted by different problems. State

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115. The arguments that we advance in Part IV.C are applicable to the state constitutional law enterprise. Unless state law development is mindful of the inherent intellectual and practical problems associated with individual rights consciousness, it will fall victim to the same critiques.

116. Ultimately, the state law movement fortifies federalism on both sides of the divide: it aims for strong protection of liberal normative values on the national, as well as the state, levels. Obviously, state law can never be a substitute for its federal counterpart. This is because the state law enterprise is vulnerable on at least two fronts. First, it is more susceptible to political pressures, *i.e.*, judicial elections and the state constitutional amending process. Second, there may be pragmatic constraints on the independent development of state law because of the socio-economic impacts that maverick reforms will engender. *See generally* Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593 (1980); Wilson, *The Politics of Regulation*, in *THE POLITICS OF REGULATION* 366-70 (J. Wilson ed. 1980).

These arguments notwithstanding, state law *is* law, and the state law movement *is happening*. Liberal scholars cannot afford to remain ostrich-like in the face of a movement that offers the most hospitable judicial forum in a conservative era for checking governmental abuse.

117. For an informative introduction to recent state constitutional law developments in Oregon, see Buttler, *Oregon's Constitutional Renaissance: Federalism Revisited*, 13 VT. L. REV. 107 (1988); Schuman, *The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection,"* 13 VT. L. REV. 221 (1988). *See also* note 187 *infra*.

judges are not apt to resolve state law claims if the latter are either not raised or are presented in an abbreviated or supplemental fashion. Yet, that is exactly how today's law schools are training students to proceed.<sup>118</sup> Future educators need to liberate the bench and bar from the contemporary mindset that the vindication of rights claims is exclusively the domain of federal constitutional law. We have produced a generation disposed to federal constitutional combat to the exclusion of all else.

Along with the neglect of state constitutional law, liberal public law scholars have slighted opportunities for exploring state statutory law issues. Basic state statutory construction questions are regularly set aside when cast in the shadow of a constitutional question. Thus, for example, when the state seeks to abridge speech, it is all too readily assumed that the statute under which it is proceeding authorizes it to do what it claims. Eager to discuss the larger federal constitutional issues, scholars (and lawyers) too easily dismiss federal or state statutory points. If lawyers are conceding the issue, it is in large measure because their professors are unknowingly directing them to do so by failing to emphasize the critical relationship between statutory law and individual rights claims. In this regard, far too little attention is given to the fact that Judge Learned Hand's 1917 *Masses* opinion,<sup>119</sup> for example, was first and foremost an exegesis of statutory law, much more so than of first amendment law. Just as state constitutional law issues are starting to be seen as antecedent to federal law claims, so must state and federal statutory questions be assigned an antecedent status in individual rights cases. In legal academia, the literature on statutory construction is left primarily to commercial law scholars. Consequently, the bench and the bar receive little or no aid, or even encouragement, from liberal scholars suggesting ways to reconcile constitutional claims of right with statutory law.<sup>120</sup>

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118. See Collins, Galie & Kincaid, *State High Courts, State Constitutions and Individual Rights Litigation Since 1980: A Judicial Survey*, 13 HASTINGS CONST. L.Q. 599, 616-19 (1986). Much the same holds true for the "pedagogy of jurisprudence." See Eskridge & Frickey, *supra* note 96, at 726-27.

119. *Masses Publishing Co. v. Patten*, 244 F. 535 (S.D.N.Y.) (L. Hand, J.), *revd.*, 246 F. 24 (2d Cir. 1917).

120. Consistent with the preceding section, liberal legal scholars need to construct conceptual platforms for viable state constitutional amendments and statutory reforms. See, e.g., Collins, *Reliance on State Law: Protecting the Rights of People with Mental Disabilities*, 13 VT. L. REV. 305 (1988). It is too easily forgotten that the Brandeis progressive tradition was built on such positive law innovations, which subsequently had to be defended in conservative courts. See generally M. UROFSKY, *LOUIS D. BRANDEIS AND THE PROGRESSIVE TRADITION* (1981).



### C. Normative Scholarship: Focus on Individual Rights Consciousness

A third avenue for reconstructive scholarship entails the reexamination of the contemporary liberal legal emphasis on "individual rights consciousness." Such a reexamination is necessary in order to answer telling criticisms which have been leveled against liberal rights theory. Ultimately, this self-evaluation revitalizes. It enables liberals to abandon concepts whose intellectual and political force is depleted. Concomitantly, it empowers them to embrace a "new consciousness."

We begin this section with comments introducing two major categories of assaults on legal liberalism. These categories are then examined in turn. First, various problems of intellectual bankruptcy, involving both normative premises and methodology, are discussed. Second, several problems of political infeasibility are identified. Against this backdrop, we sketch a few ideas which we believe integral to the evolution of a new consciousness.

Liberal legal scholarship has become a captive of "individual rights consciousness." With few exceptions, the most influential works of liberal constitutional scholarship in the past forty years have addressed individual rights jurisprudence.<sup>121</sup> Since the turn of the century, leading constitutional law school texts have concentrated ever more heavily on individual rights issues.<sup>122</sup>

The current conservative profile of the federal courts may threaten the liberal individual rights movement. Even if this profile should change, the contemporary state of individual rights consciousness portends its own demise. As will become evident, little of liberal theory has been spared assault. Legal liberalism is under attack by the

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121. See generally R. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); J. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); D. RICHARDS, *THE MORAL CRITICISM OF LAW* (1977); L. TRIBE, *CONSTITUTIONAL CHOICES* 165-266 (1985); Karst, *The Supreme Court, 1976 Term — Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417 (1977); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973).

It is interesting to note that 21 of the 25 most-cited constitutional law articles in American law journals published from 1947 to 1985 are dedicated to individual rights issues. See Shapiro, *supra* note 40, at 1549-51.

122. In this regard, a comparison of the percentage of the text devoted to individual rights issues in the first and latest editions of a classic law school casebook in federal constitutional studies is illuminating. The first edition of N. DOWLING, *CASES ON AMERICAN CONSTITUTIONAL LAW* (1937) dedicated 384 pages of 1153 total pages, or 33% of the text, to individual rights doctrine, including state action, equal protection, economic substantive due process, procedural due process (excluding regulatory due process), privileges and immunities, first amendment, taking and criminal procedural topics. G. GUNTHER, *CONSTITUTIONAL LAW* (11th ed. 1985) dedicated 1126 pages of 1633 total pages, or 69% of the text (excluding materials in the current Supplement), to the same subjects, with the notable exclusion of criminal procedure.

more radical left<sup>123</sup> as well as the conservative right.<sup>124</sup> Their indictments are not to be taken lightly; and yet, there have been few attempts among liberal scholars to meet the charges head on.<sup>125</sup> The embattled posture of liberal theory offers a challenge: will the liberal scholar evaluate, in a serious and intellectually honest fashion, the failures of individual rights jurisprudence, in order to reform the liberal normative program?

### 1. *Charges of Intellectual Bankruptcy*

*a. The inadequacy of normative premises.* Europe's Enlightenment philosophers established the intellectual constructs that support current liberal legal theory. The political and moral philosophy of Thomas Hobbes, David Hume, Immanuel Kant, and John Locke presented the individual as a free, rational, and autonomous agent who was both the source of political authority and the ultimate justification for its exercise.<sup>126</sup> Grounded in this concept of the individual, liberal

123. Overly broad and unsubtle as the characterization may be, it appears that a primary objective for the adherents of Critical Legal Studies is the exposure of the "recurring, deep, and intractable contradictions" of liberal normative theory in constitutional scholarship, in order to "delegitimize" its intellectual force as a legal ideology. See Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1229-30 (1981). For classic examples of "debunking" of the liberal normative scholarship, see, for example, M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 62-79, 275-76, 289-90 (1987); Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN LAW AND SOCIOLOGY 25 (S. Spitzer ed. 1980); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363 (1984).

124. For an account of the "growing influence" of a "philosophic conservatism of a special kind" in our public life, as applied to constitutional law, see Bluhm, *Liberalism as the Aggregation of Individual Preferences: Problems of Coherence and Rationality in Social Choice*, in THE CRISIS OF LIBERAL DEMOCRACY 269 (K. Deutsch & W. Soffer eds. 1987); Wood, *The Fundamentalists & the Constitution*, 35 N.Y. REV. BOOKS, Feb. 18, 1988, at 33 (describing and critiquing the constitutional contributions of "Straussians"); see also THE JUDGES' WAR (P. McGuigan & J. O'Connell eds. 1987); G. McDOWELL, CURBING THE COURTS (1988); PORNOGRAPHY: SOLUTIONS THROUGH LAW (C. Clancy ed. 1985); STILL THE LAW OF THE LAND? (J. McNamara & L. Roche eds. 1987); *The Crisis in Legal Theory and the Revival of Classical Jurisprudence*, 73 CORNELL L. REV. 281 (1988) (articles based upon the proceedings of the Sixth Annual Symposium of the Federalist Society for Law and Public Policy Studies).

125. Dean Paul Brest's article, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981), may be the closest example to the contrary: an arguably liberal-leaning constitutionalist admitting doubt about the defensibility of fundamental rights jurisprudence. Although the piece may be criticized for its inconclusive posture, as a depicted act of liberal ideological self-analysis it is noteworthy and refreshing.

126. See, e.g., T. HOBBS, LEVIATHAN (A. Waller ed. 1904) (the natural state of man is independent and self-interested, and government is the creation of individuals to further their personal security and self-interests); D. HUME, A TREATISE OF HUMAN NATURE (L. Selby-Bigge ed. 1888) (the authority of principles of justice and of government rests on their utility for collaboration among individuals); I. KANT, THE PHILOSOPHY OF LAW (W. Hostie, ed. 1974) (political obligation is a subspecies of moral obligation, the source of moral authority deriving from principled reasoning by autonomous individuals); J. LOCKE, SECOND TREATISE OF CIVIL

legal theory holds that government and law are the products of rational and self-interested action by individuals, and that the preservation of conditions for the realization of individual self-interest is the primary reason for their creation. The "rights-based" theories of legal liberalism place, at their center, concern for individual value preference and liberty of individual action.

Alexis de Tocqueville was an early critic of the "social atomism"<sup>127</sup> that is embodied in the American liberal legal tradition. He observed that human relations on an individualist, contractarian basis encouraged each citizen to regard himself or herself in isolation, to take care of personal self-interest, and to leave society to look after itself.<sup>128</sup> Two centuries later, individual rights theory is still vulnerable to the charge of social atomism.<sup>129</sup> The charge holds that the autonomous and free individual is a useless myth; it is questionable whether the model of independent and self-regarding action can be squared with socioeconomic realities and the bureaucratic state. Further, a rights-based theory may endanger liberal political values since it may result in meaningless regulation of human relationships or ineffective remedies for social problems. The following three attacks on individual rights theory clarify the charge:

(i) Individual rights consciousness places inappropriate and unacceptable burdens on persons who are not in a position of power to claim their hypothetical rights.

Liberal legal theory promotes the idea that the individual is re-

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GOVERNMENT (J.W. Gough, ed. 1947) (Man is free, equal and independent, and divests himself of natural liberty to secure enjoyment of his interests.).

127. The term "social atomism" is used by Professor Elizabeth H. Wolgast to refer to the "fundamental picture" of liberal legal society "as a simple collection of independent, self-motivated units." E. WOLGAST, *THE GRAMMAR OF JUSTICE* 4-5 (1987). Wolgast's important work examines the relationship of social atomism to the "invocation of individual rights" in American law, and, in an essay called *Wrong Rights*, critically analyzes the impact of liberal use of the "language of rights" on current social and moral conditions. *Id.* 28-49. Professor Wolgast introduced the term in her earlier book on gender equality to describe the liberal vision of society as "a collection of individuals, each with his own basic interests and autonomy, even as he lives in association with others." E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* 138-42, 148-56 (1980).

128. 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 477-78 (J. Mayer & M. Lerner eds. 1966). It would be misleading, however, to suggest that because de Tocqueville criticized the political effects of a philosophy of individualism he did not appreciate the value of a system of enforceable rights against governmental tyranny. 1 A. DE TOCQUEVILLE, *supra*, at 219. Indeed, de Tocqueville perceived the American system of rights and the freedom it secured to promote active participation in public affairs and private associations, which would mitigate the destructive excesses of individualism. 2 A. DE TOCQUEVILLE, *supra*, at 497-99, 511-13; see Macedo, *Capitalism, Citizenship, and Community* (forthcoming in J. SOC. PHIL. & POL. (1989)).

129. In a perceptive essay, Professor Anastaplo shows how a similar atomistic attitude plagues the "Moral Majority." Anastaplo, *Church and State: Explorations*, 19 LOY. U. CHI. L.J. 61, 168-73 (1987).

sponsible for invoking and pursuing his or her own rights. Rights are to be claimed. Legal force is marshalled behind the individual with the variety of means — the political and economic prowess, physical force, education and understanding, and psychological will — to assert them. The problem, of course, is that legal liberalism presumes the rights-claimant to be an individual of such means. The rights-claimant is to be a peer of the injuring party. But parity in power may not be a realistic assumption in many relationships where society may nevertheless have an interest in imposing responsibility.

Current constitutional law and liberal legal theory have not adapted in a positive manner to “changes in the relationships of power and powerlessness” which lie at the base of contemporary socioeconomic problems. In “an age in which power has flowed . . . to government, to large institutions,” law might “focus particularly on what might be called ‘middle class law,’ the law of people in relationship to institutions and organizations.”<sup>130</sup> To order transactions among social actors of differing power, the law may have to describe the obligations and regulate the responsibilities of actors to one another in social relations, rather than merely to furnish the channels for individual assertion of rights.

When individual rights theory governs situations where people are not in a realistic position to exercise their rights, “the invocation of a right is often a means of avoiding placing responsibility on someone in a position of strength and control.”<sup>131</sup> “[S]uch a conception of individuals and their rights may not be an effective means of addressing some injustices.”<sup>132</sup> The point is forcefully illustrated by Professor Elizabeth Wolgast in her example of the “code of patients’ rights” instituted by the American Hospital Association:

Now what can be wrong with this way of dealing with patient care? First, these rights . . . imply that hospital personnel are commonly guilty of unethical or insensitive conduct; otherwise there would be no need to protect patients against abuse. Second, the institution of rights focuses on a patient as complainant. . . . [But] the patient is not in a good position to exercise such rights. . . . Giving him rights puts him in the role of an assertive and able individual, but this role is inconsistent with being ill.

. . . .

. . . It’s the doctor who needs to be reminded of his charge, and that’s where the focus ought to be, logically — on the doctor and his or her

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130. Reich, *supra* note 100.

131. E. WOLGAST, *THE GRAMMAR OF JUSTICE* 49 (1987).

132. *Id.* at 32.

responsibility.<sup>133</sup>

(ii) Individual rights consciousness is hard-pressed to assign legal responsibility for unacceptable societal conditions to individuals who are not personally blameworthy.

Individual rights theory thwarts the capacity of the legal system to correct generalized societal wrongs. With its grounding in individualism, legal liberalism limits a person's liability for wrongs that are not that person's own doing. The law is more likely to redress an injury that is directly attributable to the intentional actions of an identified party than a harm which cannot be labelled as someone's fault. Unacceptable conditions that are personal to the rights-claimant are more likely to be recognized as legal injury than wrongful conditions that exist as generalized social phenomena.

Constitutional law doctrine abounds with examples of such constraints that liberal atomism places on legal liability. For instance, the narrow concept of "purposeful discrimination," which defines the scope of duty for state officials under the equal protection clause, ties state liability for discriminatory treatment to governmental "fault."<sup>134</sup> Also, late developments in the standing doctrine reinforce the liberal premise that law is to be primarily concerned with the misguided conduct of blameworthy individuals whose actions are outside the social fabric.<sup>135</sup>

The problem here is that the atomistic notions of "fault," "causa-

133. *Id.* at 34-35. For another illustration of the failure of individual rights theory to order social relations in a coherent and meaningful manner, see Minow, *We, The Family: Constitutional Rights and American Families*, in *THE CONSTITUTION AND AMERICAN LIFE* 299 (D. Thelan, ed. 1988) [hereinafter Thelan]. Professor Martha Minow argues persuasively that the language of rights has proven an "awkward locution for speaking about families."

Stemming from a tradition of possessive individualism, rights rhetoric in this country traditionally has referred to the relationship between an autonomous, self-determining, competent adult individual and the state. Although the family is neither of those two players, the deployment of rights rhetoric can push the family into either position.  
*Id.* at 319.

134. The current state of constitutional and statutory anti-discrimination law focuses "more on what particular perpetrators have done or are doing to some victims than . . . on the overall life situation of the victim class." Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978); see also Mensch & Freeman, *Liberalism's Public/Private Split*, *TIKKUN MAG.*, Mar.-Apr. 1988, at 24. For analysis of the restraints that the doctrine of "state action" places on a meaningful enforcement of constitutional equal protection and due process requirements, see Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503 (1985) (federal constitutional "state action" doctrine); Skover, *The Washington Constitutional "State Action" Doctrine: A Fundamental Right to State Action*, 8 U. PUGET SOUND L. REV. 221, 254-81 (1985) (state constitutional "state action" doctrine).

135. See, e.g., *Allen v. Wright*, 468 U.S. 737 (1984). Justice O'Connor's majority opinion delimited the scope of constitutional harm, first, by confirming that "stigmatic injury" would be judicially cognizable only to the extent that the claimant was personally subject to discriminatory treatment, 468 U.S. at 757 n.22; second, by explaining that the function of the "fairly traceable" component of the standing doctrine was to restrain the judiciary from ordering relief, even if

tion," and "responsibility" undermine the possibility of achieving through the legal system those substantive values cherished by the liberal political program. Professor Alan Freeman makes the point succinctly:

The fault concept gives rise to a complacency about one's own moral status; it creates a class of "innocents," who do not feel any personal responsibility for the conditions associated with discrimination, and who therefore feel great resentment when called upon to bear any burdens in connection with remedying violations.<sup>136</sup> [A]s a result, the actual conditions of racial powerlessness, poverty, and unemployment can be regarded as no more than conditions — not as racial discrimination. Those conditions can then be rationalized by treating them as historical accidents or products of a malevolent fate, or, even worse, by blaming the victims as inadequate to function in the good society.<sup>137</sup>

(iii) Individual rights consciousness presumes that the appropriate legal response to a social problem is the discovery and enforcement of novel individual rights.

By emphasizing rights, liberalism generates three stubborn theoretical problems. First, pitting individual rights against one another, liberal legal doctrine often places its essential premises in conflict: it may suffer from "*inter-bases conflict*."<sup>138</sup> Second, since it professes neutrality to individual preferences and exercises of personal liberties, liberalism may be criticized for striving to *escape from value choices*. Third, in the context of judicial action, concerns of *comparative institutional incompetence* have prevented the courts from articulating "new rights." We next examine these three problems.

Conflicts in the premises of liberalism arise because legal liberalism is the standardbearer of equality and democratic majoritarianism at the same time that it has been dedicated to the sanctity of individual value preference. Both egalitarianism and majoritarianism are critical to the liberal enterprise. For example, equality of the vote, unencumbered access to the franchise, and regularity of governmental processes are at the heart of liberal constitutionalism. Yet, liberalism is dedicated to the sanctity of individual value preferences: for, with majority rule goes minority suppression, which violates the individual's autonomy. Phrased differently, at its base, legal liberalism is inher-

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effective in correcting the wrongful conditions suffered by the claimants, unless the institutional responsibility of the government could be established, 468 U.S. at 753 n.19.

136. Freeman, *supra* note 134, at 1055.

137. *Id.* at 1103.

138. "Inter-bases conflict" describes the situation in which a legal premise or position may appear valid on one legal basis, but may appear invalid on another legal basis. For further description and illustration of the concept, see P. SCHLAG & D. SKOVER, *TACTICS OF LEGAL REASONING* 24-26 (1986).

ently conflicted, as it pits individuality against majority.<sup>139</sup>

The phenomenon of "inter-bases conflict" in current liberal constitutional law, can be further demonstrated by three examples. First, the concept of affirmative action co-exists uncomfortably with the liberal legal notion of formal equality of rights in contemporary equal protection theory.<sup>140</sup> Similarly, governmental restriction of the political speech of some individuals or entities in order to enhance the speech of others in federal election regulation may be inconsistent with the liberal legal notion of governmental neutrality in the "marketplace of ideas."<sup>141</sup> Finally, freedoms of expression and the press protect pornography from social control, while equal regard for the status of women and children and social interest in the regulation of order and morality argue for constraints on "nonobscene but indecent" presentations of sexual relations.<sup>142</sup>

The second of these problems is that today's liberals avoid value choices. Although liberal theory must mediate among fundamentally conflicting values, it attempts to remain faithful to the maxim that

139. See, e.g., Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 826-27 (1983) (social atomism preempts formation of community values).

140. Current Equal Protection doctrine validates the law that treats all individuals identically without regard to substantive differences in native attributes and traits, or in social conditions. This formal notion of equality responds to the maxim of liberal egalitarianism: the law judges no person except by his or her merits. See, e.g., *Defunis v. Odegaard*, 416 U.S. 312, 320 (1974) (Douglas, J., dissenting).

Elizabeth Wolgast appreciates the embarrassment to liberal legal theory in affirmative action programs, which "rest on the factors that distinguish people from one another, while in the [liberal] model any distinctions of treatment are discriminatory and thus unfair." E. WOLGAST, *THE GRAMMAR OF JUSTICE* 39 (1987).

141. When invalidating restrictions on "independent expenditures" for federal electoral candidates in *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976), the Supreme Court asserted that "the concept that government may restrict the speech of some . . . in order to enhance the relative voice of others is wholly foreign to the First Amendment." The Court's invalidation of the governmental purpose to equalize the relative ability of individuals to influence the outcome of elections sparked the criticism of many a liberal legal scholar and jurist. See, e.g., Lowenstein, *Campaign Spending and Ballot Propositions: Recent Experience, Public Choice Theory, and the First Amendment*, 29 UCLA L. REV. 505-78 (1982) (the power of some groups to raise enormous sums of money, without regard to any breadth or depth of popular feeling, seriously interferes with the ability of other groups to use the institutions of direct democracy for their intended purpose); Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982); Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1015-19 (1976).

142. *Miller v. California*, 413 U.S. 15 (1973), and its progeny, e.g., *Ward v. Illinois*, 431 U.S. 767 (1977); *Jenkins v. Georgia*, 418 U.S. 153 (1974), have set parameters for distinguishing pornography protected under the first amendment from obscenity that government may regulate or prohibit. The liberality of the obscenity doctrines has been challenged by a feminist critique grounded in gender equality. This critique views pornography as a "political practice" of "subordination of women to men." MacKinnon, *Not a Moral Issue*, 2 YALE L. & POLY. REV. 321, 322-24 (1984); see also A. DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* (1981); MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985); Note, *Anti-Pornography Laws and First Amendment Values*, 98 HARV. L. REV. 460, 475 (1984).

government must tolerate individual and autonomous preferences. Indeed, certain liberal models of adjudication are constructed to avoid judicial selection of values. They promote decisionmaking by "neutral principles"<sup>143</sup> or by "process-oriented review."<sup>144</sup> These models reveal the vulnerability of liberal normative theory to the criticism that it searches to escape from value choice.<sup>145</sup> Harry Clor argues that when society consists of a variety of discrete communities of value, entitled under law to equal social status and acceptance, the rule of neutrality undermines the power of government "to make of man something more than a creature of elemental passions and sensations."<sup>146</sup> Liberal theory cannot refuse to privilege values without opening itself to attack for moral relativism.<sup>147</sup>

Third, liberalism suffers from the institutional restraints placed on judges' ability to fashion rights. Because liberalism invokes a right to correct a wrong, a legal remedy for personal losses or social harms that are not easily classified among traditional legal injuries may depend on the articulation of "new rights."<sup>148</sup> In this regard, liberalism may be saddled with institutional inertia, given the character of federal and state court systems.

The judiciary's prudential concerns over its own competence, vis-à-vis the political branches of government, to affect important issues of social policy may prevent it from restructuring entitlements of right.

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143. The proposal for adjudication according to "neutral principles" is associated with its primary spokesman, Professor Herbert Wechsler. See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959).

144. See J. ELY, *supra* note 28 (theory of "process-perfecting" review).

145. See, e.g., Sandel, *Democrats and Community*, NEW REPUBLIC, Feb. 22, 1988, at 20, 23 ("A public life empty of moral meanings and shared ideals does not secure freedom but offers an open invitation to intolerance.").

146. H. CLOR, *OBSCENITY AND PUBLIC MORALITY* 242 (1969) (discussing obscenity).

147. The susceptibility of liberal normative theory to an irresponsible and illusory search for freedom from choice has been attacked, of late, by a strange combination of ideological bedfellows. Professor Allan Bloom of the University of Chicago argues, in essence, that the only "moral postulate" or "virtue" in American liberal democracy is cultural "relativism," the relinquishment of any absolute virtues or values. A. BLOOM, *THE CLOSING OF THE AMERICAN MIND* 25-26 (1987). To the same effect, Professor Laurence Tribe mercilessly attacks the recent spate of constitutional discourse among scholars and judges, particularly methods of constitutional interpretation such as intentionalism, representation-reinforcement, and process-oriented review, for the ultimately incoherent escape from choice. Tribe writes, "The pretense that such choices may be avoided by some interpretive or analytic magic . . . is pervasive. To abandon that pretense is a beginning of wisdom, if only a small one." L. TRIBE, *CONSTITUTIONAL CHOICES* 267 (1985); see also Hayden, *Our Finest Moment*, 4 NEW PERSPECTIVES Q. 20 ("I think Bloom is absolutely right in drawing attention to . . . objectivity [which] masks a moral neutralism.").

148. Professor Charles Reich suggests as much, in arguing that "changes in the relationships of power and powerlessness" which have characterized the evolution of the modern technobureaucratic state have not been followed by the judicial recognition of "new rights" that "can protect us against the new wrongs and new losses that have come to threaten our society." Reich, *supra* note 100.



Discovery of a legal right involves the judiciary in the allocation of resources and interests; the more important the social issue, however, the less likely the discovery of individual rights. Professor Neil Komesar has explained the legal system's inertia in enforcing fundamental individual rights to basic life necessities as a function of the judiciary's relative institutional incompetence to arbitrate important socioeconomic issues:

Why are values such as expression and education arguably more fundamental than housing, food, jobs, and, one might add, peace and war?

The answer may lie in the institutional role served by the concept of "fundamental rights." . . . These subjects are not excluded from the list of "fundamental values" because they are unimportant. If anything, they are excluded because they are too important. More exactly, they are excluded because the relative institutional abilities of the legislative process vis-a-vis those of the judicial process are thought to favor the former.<sup>149</sup>

*b. The inadequacy of methodology.* In addition to the assaults on normative premises, liberal legal theorists must confront the problems of their methodological preferences. To mediate value conflicts, liberal theory prefers the method of "balancing," the sensitive sifting and weighing of the circumstances, typically on an ad hoc basis.<sup>150</sup> The process of balancing normative values predominates in current constitutional doctrine. Even a perfunctory examination of the Supreme Court's decisions in the areas of fourteenth amendment state action and privacy and of first amendment free speech makes this predominance all too apparent.<sup>151</sup>

149. Komesar, *supra* note 30, at 438; *see also* J. ELY, *supra* note 28, at 59 (systematic bias in judicial choice of fundamental values in favor of interests of upper-middle professional classes); *infra* notes 182-84.

150. Professor Mark Tushnet's overview of public law scholarship over the past sixty years suggests:

Most legal scholarship in the United States has been captivated by the metaphor of balancing, so much so that balancing is now generally seen as expressing the rule of law. In particular, the dominant view of the Constitution is that its proper interpretation produces balancing tests in virtually every area of its application.

Tushnet attributes this phenomenon to the "triumph of American Legal Realism" in recasting the rule of law tradition: "Legal Realism was received into legal scholarship in the United States as a prescription that sensible legal decisions necessarily rested on a sensible balance of competing policies." Tushnet, *Legal Scholarship*, *supra* note 25, at 810.

151. The predominance of balancing is evident in the fourteenth amendment "state action" doctrine. *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 722 (1961) (open admission that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance"). Although less prevalent, balancing is also present in first amendment doctrine. *E.g.*, *New York v. Ferber*, 458 U.S. 747 (1982) (state regulation of child pornography); *Cantwell v. Connecticut*, 310 U.S. 296 (1940) (state control of hostile audience); *Schneider v. State*, 308 U.S. 147 (1939) (state interest in litter prevention). Balancing is central, as well, to substantive due process doctrine. *E.g.*, *Roe v. Wade*, 410 U.S. 113 (1973) (state interests may override woman's privacy rights in second and third trimesters of

The liberal preference for balancing can be explained, in part, by pragmatism. A realistic legal system that refuses to hold any principle absolute and transcendent will depend on the parsing of and the contextualization of principle.<sup>152</sup> Furthermore, the viability of the constitutional regime over time may depend on flexible and efficient accommodation of governmental exercises of power. This defense of liberal legal balancing is allied with one pluralist view of American politics, where results are understood as the amalgamation or compromise of preferences expressed by competing interest groups.<sup>153</sup>

Balancing will be undertaken, however, at a certain expense to the liberal program. The definition and weighing of competing values by reference to the collective conscience, or to a morality tied to intrinsic human values, pits individual rights against the force of societal interests.<sup>154</sup> The likely results of balancing should be obvious: restraints on exercises of governmental power are largely understood only after the fact; and, a right against society is only as strong as the collective is willing to tolerate.<sup>155</sup> At a minimum, liberals may need to incorporate a greater sense of the necessity for judgment based on a centrality of values.<sup>156</sup>

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pregnancy). Balancing is by no means limited to these areas, as is evidenced by its use in the doctrines of Dormant Commerce Clause, intergovernmental immunity, and procedural due process, among others. The scholarly influence of Oliver Wendell Holmes, Roscoe Pound, Benjamin Cardozo, and the legal realist school of jurisprudence on the emergence of balancing as the dominant form of constitutional decisionmaking is well traced in Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 955-58 (1987). Current debate over the methodology of balancing continues in the first amendment area. *Id.* at 944 n.4 (list of commentators).

152. The process of balancing accommodates a jurisprudence that is both pragmatic and instrumentalist, reaching a decision with an eye to the consequences of its ruling. See Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2123-24 (1985) ("That some such process [of balancing] must be a part of any practical legal system is undeniable.").

153. Professor Michelman distinguishes the "public-interest" model of politics from the pluralist model, which he calls the "public-choice" model. In his opinion, the "public-choice" model conforms with the philosophy of legal liberalism, for it reinforces the atomistic premise of self-realization and self-maximization in the political, economic, and social arenas. Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 148 (1978).

154. The weighing of individual interests against societal concerns can be logically flawed when there is a combination of values at different levels of abstraction. See P. SCHLAG & D. SKOVER, *supra* note 138, at 39-43 (1986).

155. One prominent liberal theorist has noted the dangers of constitutional balancing to the liberal enterprise of "rights" protection. See R. DWORKIN, *LAW'S EMPIRE* 373-99 (1986); R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 193-95 (1977). The likelihood that an individual right will be sacrificed for the collective interest is anathema to Dworkin's notion of rights as "trumps" over public policy.

156. Indeed, this point has been made even from a libertarian perspective. Consider S. Macedo, *A Liberal Theory of Virtue, Citizenship, and Community* (forthcoming); Macedo, *Liberal Virtues, Constitutional Community*, 50 REV. POL. 215, 223 (1988).

## 2. Charges of Political Infeasibility

a. *The problem of descriptive irrelevance.* Beyond value neutrality, there appears to be no consensus among current individual rights scholars about the appropriate theory for deciphering fundamental legal values. For some, the touchstone may be common or conventional morality,<sup>157</sup> whereas it may be meta-constitutional moral philosophy for others.<sup>158</sup> In either case, is liberal legal theory descriptively relevant? Does it bear any realistic relationship to the ways in which judges actually function when enforcing legal rights?<sup>159</sup> Is there more of prescription than description in the scholars' methods?

Ultimately, the charge of descriptive irrelevance is a serious one. Individual rights theory is not offered to readers as pure political philosophy, to be judged according to the standards of coherence and consistency applied to that study. Rather, it is likely to be meaningful to the legal community only if it is descriptively accurate. We return to this point in our examination of the "linguistic link" for a new consciousness.

b. *The problem of balkanization.* Liberalism appears today to be composed of an amalgam of special interests. On both its political and academic fronts, liberalism is associated with a number of narrowly focused ideological groups that have not been integrated into a broad, common perspective. As noted in Part II, political commentators have characterized the Democratic Party as a coalition of "too many messages,"<sup>160</sup> increasingly factionalized by interest groups com-

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157. Representative of conventional morality theorists are Professors Michael Perry and Harry Wellington. Despite variations on the common theme, both promote constitutional adjudication that enforces values defined by conventional morality. See note 121 *supra*.

158. Among fundamental rights theorists who depend upon moral reasoning to ascertain constitutionally protected values, Professors Laurence Tribe, Kenneth Karst, and David Richards figure prominently. In a most open and candid fashion, Professor Richards grounds his advocacy of individual rights jurisprudence in moral philosophy: he invokes liberal theory from Milton and Locke to Ronald Dworkin and John Rawls in ascertaining moral rights that must be legally enforceable rights. See note 121 *supra*.

159. For examples, three of the U.S. Supreme Court's celebrated decisions in the area of constitutional "privacy" challenge the viability of the primary methods in fundamental rights jurisprudence. It may be difficult to justify *Eisenstadt v. Baird*, 405 U.S. 438 (1972), or *Roe v. Wade*, 410 U.S. 113 (1973) under a system of conventional or consensus morality, as Professor Wellington, one of its major proponents, makes quite apparent. Wellington, *supra* note 121, at 296-97, 305-07. On the other hand, the moral theorists generally would find the Court's recent denial of "privacy" protection to consensual adult homosexual activity in *Bowers v. Hardwick*, 478 U.S. 186 (1986), a sacrifice of constitutional moral principles. L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1421-35 (2d ed. 1988); Karst, *The Freedom of Intimate Association*, 89 *YALE L.J.* 624, 682 (1980); Richards, *Sexual Autonomy and the Constitutional Right to Privacy: A Case Study in Human Rights and the Unwritten Constitution*, 30 *HASTINGS L.J.* 957 (1979). The application of the methods of these fundamental rights scholars to the constitutionality of criminal sodomy laws is discussed in Brest, *supra* note 125, at 1078-80.

160. In a speech given on November 28, 1984 during a symposium sponsored by the "Coali-

mitted to "categorical representation."<sup>161</sup> The balkanization of the liberal political spectrum has been represented as the main cause for the electoral failures of the Democratic Party since the 1970s.<sup>162</sup>

Liberalism is no less factious in the legal academy. Liberal scholars of the current individual rights tradition divide over the fundamental values to be accorded constitutional protection,<sup>163</sup> and stratify into theoretical schools on the justifications for constitutional review.<sup>164</sup> Naturally, factionalism dilutes the power of liberalism, both as a political and as an intellectual force. The question that should pique the liberal legal scholar is whether the normative dilemmas of liberal theory are at all responsible for this balkanization. In fact, it seems likely that the fragmentation in the liberal political spectrum is, in some sig-

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tion for a Democratic Majority," the Democratic governor of Virginia, Charles Robb, claimed that "[a]t the national level" the Democratic Party had become "a party with too many messages. . . . We are the party of the poor. We are the party of the worker, of the small farmer, of the urban dweller, of the renter. The list goes on and on." Farrell, *Democrats Pore Over the Results and Discuss Some New Formulas*, N.Y. Times, Nov. 29, 1984, at 15, col. 3.

161. Professor Samuel Huntington, a past member of the board of the Coalition for a Democratic Majority, charges the Democratic Party with loss of majority status in national politics, in part, because "the control of the Democratic Party by the New Deal coalition was challenged by the rise of new groups that had become politically mobilized during the 1960s." Huntington, *supra* note 51, at 65. Professor Huntington claims that, after rising to prominence in the party, these interest groups imposed "categorical representation:" "the proposition that the interests of particular groups can be properly represented only by individuals who are themselves members of those groups, blacks by blacks, women by women, union members by union members." *Id.* at 67. This, Huntington explains, prevented the "spokesmen" from

understanding and representing the interests of other groups and from attempting to reconcile and integrate differing group interests into a broader perspective. . . . Carried to an extreme, categorical representation becomes, in a sense, anti-political since it denies the role of the political leader to extract, refine, and create the *res publica* that people have in common.

*Id.*

162. See note 51 *supra*; see also T. FERGUSON & J. ROGERS, *supra* note 24, at 4-11. The account that Professors Ferguson and Rogers tender of public opinion and of political influence of business elites ultimately rejects the charge that special interest groups were responsible for "running the Democratic Party into the ground." *Id.* at 12-19, 28-29, 33-36, 194-96. However that may be, the potential for progressive Republicanism is greater to the extent that it does not have to confront these problems. Moreover, the arguments set out in Part IV.C.3 may be adapted to progressive Republicanism.

163. See, e.g., note 159 *supra* (differing treatment to issues of privacy in abortion and sexual preferences). Normative rifts among liberal scholars are not reserved to the privacy rights area, as controversies over issues of gender discrimination and affirmative action readily demonstrate. See Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 730-31 (1985) (discrete and insular minorities are not likely to require judicial protection); Ely, *The Constitutionality of Reverse Racial Discrimination*, 41 U. CHI. L. REV. 723, 735-36 (1974) (reasons for heightened scrutiny lacking when political majority burdens itself with affirmative action remedies for political minorities); Karst, *Equal Citizenship under the Fourteenth Amendment — Foreword*, 91 HARV. L. REV. 1, 23 (1977) (heightened scrutiny for gender classification, since immutable and highly visible trait).

164. See note 121 *supra* (schools of common consensus, conventional morality, natural rights, and process-perfecting review). Cf. J. ELY, *supra* note 28, at 48-55, 63-69 (attacking natural law, neutral principles, common consensus); Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980).

nificant sense, related to the prevalence of individual rights consciousness in liberal theory. With its emphasis on individual freedom and the sanctity of personal preferences, liberalism celebrates the "id."<sup>165</sup> The competitive pursuit of a larger share of the pie, whether economic wealth, social power or fame, segments the liberal spectrum into discrete interest groups, and accentuates their ideological differences instead of their commonalities. The loss, of course, is the power of unity and the sense of any belonging. Kenneth Karst characterizes the problem of liberal balkanization in his poignant observation that "[t]he community that matters is the cold, often fleeting, community of the exchange transaction," where "the individual stands alone before forces beyond his or her control."<sup>166</sup>

c. *The problem of conservative subversion.* Although individual rights analysis became the stronghold of liberal values in the Warren Court era, the emergence of a notable strand of the new conservatism in constitutional doctrine also has occurred in the name of protection of fundamental liberties.<sup>167</sup>

There is no intrinsic alliance, of course, between fundamental rights analysis and liberal political interests.<sup>168</sup> Moreover, there is little reason to believe that the individual rights consciousness promoted by today's liberal constitutionalists cannot be co-opted by tomorrow's conservative scholars.<sup>169</sup> Liberal theorists who remain wedded to fundamental rights analysis may constantly be threatened with encroachment on their hegemony by the political right.

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165. In this regard, consider Freud's classic account of the larger psychological and cultural implications of maximization of the "id." S. FREUD, *BEYOND THE PLEASURE PRINCIPLE* (1920).

166. Karst, *Individuality, Community, and Law*, in *LAW AND THE AMERICAN FUTURE* 68, 70-71 (M. Schwartz ed. 1976).

167. See, e.g., note 169 *infra*.

168. This obvious point is evidenced by the historic roots of legal liberalism in the political philosophy of John Locke, who emphasized the protection and preservation of individual property as one of the primary justifications for government. J. LOCKE, note 126 *supra*, at 47.

169. Professor Stephen Macedo demonstrates the point superbly in his recent attack on "New Right" conservatives, such as Judge Robert Bork, Professors Raoul Berger and Lino Graglia, and former Attorney General Edwin Meese and Assistant Attorney General William B. Reynolds. Contrary to the claims of the "New Right," Macedo argues that the Constitution does not establish a basically majoritarian democracy of broad powers and few minority rights. Rather, he promotes a liberal, natural rights tradition in constitutional interpretation; the expansive language of the provisions protecting individual liberties in the Bill of Rights supports broad constitutional review powers of the judiciary. The courts must enforce the values of economic freedom, private security, property rights and liberty of contract — as well as noneconomic liberties of procedural and substantive natures — which are well anchored in the constitutional text. In sum, Macedo advocates a judicial program of "principled activism." S. MACEDO, note 22 *supra*, at 3-5, 35-37, 50-54, 60.

### 3. *Raising a New Consciousness*

If legal liberalism cannot withstand the full battery of attacks against traditional individual rights consciousness, can liberal legal scholars move beyond the conceptual premises and the language of individual rights consciousness, while still preserving a certain set of core liberal values and interests? We think so. But, in order to do this, liberal legal scholars should consider at least the following.

a. *The language of the law ("the linguistic link").* Liberalism must confront, yet again,<sup>170</sup> the reality that this is a new world where the old categories and the old intellectual formulas no longer apply, or only apply in a strained way. "Here, as elsewhere, troublesome old phrases may have served their era well in the evolution of the law. But here, as elsewhere, their era is past."<sup>171</sup> In this regard, it is important to recognize the degree to which legal liberalism has become the victim of its language, encased in the conceptual premises and constraints of contemporary individual rights terminology: "fundamental rights," "individual autonomy," "private v. public realms of action," "free and unencumbered will," and "compelling state interest."<sup>172</sup> To borrow from Gabriel García Márquez, "[t]hese are words that have come to mean very little. They're disconnected; they don't describe the reality

170. See Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CALIF. L. REV. 609 (1987) (defending liberalism against criticism of the Critical Legal Studies movement by noting that liberalism has been remarkably adaptive and that CLS, which reads law politically, fails to read liberalism politically).

171. Y. KAMISAR, note 36 *supra*, at 25 (footnote omitted) (critiquing due process "voluntariness" formula).

172. In this regard, consider Horwitz, *Republicanism and Liberalism*, *supra* note 80, at 74: All legal systems have a legal architecture that categorizes and classifies legal phenomena. Every system of legal architecture also incorporates deep into that structure a set of normative premises concerning the proper way to talk about law.

Essentially, we argue that rights discourse is structured by the conceptual premises which it inherited from the nineteenth-century tradition of liberal legal theory. The potential for rights discourse to advance the liberal political program in the future may inevitably be constrained by these intellectual structures. See, e.g., Hartog, *The Constitution of Aspiration and "The Rights That Belong to Us All,"* in Thelan, note 133 *supra*, at 362, 367 ("To use our individualistic Bill of Rights and fourteenth amendment as sources of language to constitute, recognize, and legitimate group identities is, at minimum, an odd way to articulate a collective faith."); Mensch & Freeman, *supra* note 23, at 25 ("[T]he language of privatism is a double-edged sword. . . . To have 'private' choice is also to be left alone with it.").

For the opposing view that individual autonomy need not be the precondition for a liberal system and rhetoric of rights, see, for example, Feinberg, *Liberalism, Community, and Tradition*, TIKKUN MAG., May-June 1988, at 40 (liberal ideology need not blind the individual to the social nature of man); Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, 28 NOMOS 71, 92 (1986) (right as claim grounded in human association); Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860, 1874-75, 1877, 1881, 1884-85 (1987) (rights could be understood to articulate legal consequences for patterns of human and institutional relations). Cf. Hartog, *supra*, at 358 n.13 (response to Minow); Lasch, *A Response to Joel Feinberg*, TIKKUN MAG., Mar.-Apr. 1988, at 42 (liberalism's commitment to the regulatory welfare state and social equality conflicts with the liberal philosophy of "live-and-let-live").

they represent.”<sup>173</sup>

To illustrate: Ever more systematically, our social realities are ordered and conducted by power elites, *i.e.*, burgeoning governmental bureaucracy and its private institutional counterparts. While the relationships between the individual and these power elites have changed, the language of the law that characterizes their relations has remained static.<sup>174</sup> There are real disparities between current socioeconomic realities and the linguistic framework of the liberal legal system that purports to regulate these realities.<sup>175</sup>

The evolution of a new liberal consciousness depends on the willingness and the ability of liberal scholars to secure, through different language symbols and different intellectual constructs, the broad spectrum of material, emotional and spiritual values deemed important to a liberal society. At the very least, this requires a new liberal constitutional language, *i.e.*, a new “linguistic link” to substantive reality.

*b. Majoritarianism and constitutional government.* In Part IV.A of our discussion of the future avenues for functional scholarship, we emphasized that the Bill of Rights is not a minoritarian credo. Therefore, we must ask, why haven’t liberal legal scholars viewed and explained the Bill of Rights as a safeguard for majoritarian values and interests? At bottom, there are two intellectual constraints in contemporary liberal legal consciousness that are responsible for the continued mischaracterization of the Bill of Rights. These constraints point to opportunities for future liberal scholarship.

First, the premises of liberal rights theory emphasize the individuality, rather than the commonality, of core rights. By moving away from this individual rights consciousness, liberal scholars can recast the Bill of Rights as a majoritarian document: the purpose of constitutional guarantees is to secure the interests of the entire citizenry as against all governmental abuses of power. Succinctly put, “all exer-

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173. Simons, *García Márquez on Love, Plagues and Politics*, N.Y. Times, Feb. 21, 1988, § 7 (Book Review), at 24. In the same vein, we examine, in a work-in-progress, the relationship of communications theory to first amendment jurisprudence to demonstrate that the premises of the latter are difficult to square with the realities of the former. See Collins & Skover, *The Death of Discourse* (forthcoming).

174. One example of linguistic failure is the legal terminology used to address fourth amendment “privacy” and fifth amendment “self-incrimination” issues in the context of governmental and corporate calls for mandatory drug and AIDS testing for employees. How is an “expectation of privacy,” doctrinally grounded in the sanctity of the home, to be analogized to a corresponding interest in personal waste products? Moreover, how is John Lilburne’s testimonial privilege to be extended to the withholding of physical evidence of an excretory function?

175. See Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 961 (1988) (“Increasingly the objects of work . . . consist of servicing bureaucratically defined objectives, accordingly to bureaucratically sanctioned procedures.”).

cises of power by some over others — even with what passes for the latter's consent — are *and must remain* deeply problematic. . . . *[I]n matters of power, the end of doubt and distrust is the beginning of tyranny.*"<sup>176</sup>

Second, liberal legal theory generally identifies the action of elected public officials as the political expression of majoritarian will. This identity of electoral politics and majoritarian values has assumed the status of an unquestioned article of faith. But, there are sound reasons for future liberal scholars to question this identity, as the teachings of public choice theory,<sup>177</sup> the phenomenon of legislative and agency capture by special interest groups,<sup>178</sup> and evidence of pervasive malfunctioning of representative democratic politics<sup>179</sup> would substantiate. All this is to say that liberal scholars might examine the nature of the nexus between majoritarian will and legislative enactments. Liberal scholars might begin to construct a model of constitutionalism that reveals the salutary operation of majoritarian will. By changing the characterization of majoritarian rule, liberals would be free to reunite constitutionalism with democracy, thereby allowing for the possibility of broad-based constitutional constituencies.<sup>180</sup>

176. L. TRIBE, CONSTITUTIONAL CHOICES 6, 7 (1985) (emphasis in original).

177. See, e.g., M. OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 1-3, 53-65, 125-31 (1971) (relatively small groups with concentrated economic interests are more frequently able to mobilize political power than relatively large, latent groups with dispersed economic interests); Michelman, *supra* note 153, at 148-50; Wilson, *supra* note 116, at 366-70.

178. See, e.g., S. LAZARUS, THE GENTEEL POPULISTS 223 (1974) ("[R]egulation of industry would have to be regarded as one of the least successful enterprises ever undertaken by American democracy."); M. McCANN, TAKING REFORM SERIOUSLY: PERSPECTIVES ON PUBLIC INTEREST LIBERALISM 39-44, 104-05 (1986); Fellmeth, *The Regulatory-Industrial Complex*, in WITH JUSTICE FOR SOME: AN INDICTMENT OF THE LAW BY YOUNG ADVOCATES 244 (B. Wasserstein & M. Green eds. 1971); Komesar, *supra* note 30, at 415-20.

179. See, e.g., Michelman, *Politics and Values or What's Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509-10 (1979); Parker, *The Past of Constitutional Theory — And Its Future*, 42 OHIO ST. L.J. 223, 240-43 (1981).

Over-representation of a minority in the political process is likely to occur either because social factors — education, wealth, status — block the access of other constituencies to the political process, or because the "transaction costs" of mobilization on any discrete issue may be too high for the majority. An excellent example of minority over-representation due to both failures is provided in Congress' enactment of The Alaska National Interest Lands Conservation Act (ANILCA), Pub. L. No. 96-487, 94 Stat. 2374 (codified as amended at 16 U.S.C. §§ 3101-3233 (1982)). Despite the purpose of the Act to preserve nationally significant lands and waters in their wilderness state, ANILCA permitted quartz mining in an area identified for preservation by a major corporate concern. At a distance of over 4,000 miles, the costs of lobbying Congress directly would have been substantial for recreational and subsistence users in the affected area. Even more important, because the economic benefits of the exemption were concentrated in the single corporate concern, it had a tremendously high stake in promoting its interest, vis-à-vis the environmental benefits that would have been shared generally by the local citizens opposed to the mining.

180. This recharacterization must, however, be mindful of the "Jonestown" phenomenon. See Stone, *A Response to Mensch & Freeman*, TIKKUN MAG., Mar.-Apr. 1988, at 31; see also



Such reconstitutive scholarship may move along some of the general tracks that we have already identified. Most apropos is the avenue of functional scholarship, directed toward lawmakers, that proposes certain legislative and/or administrative reforms.<sup>181</sup> Moreover, constitutional theorists may consider the legitimate role of judicial review for contexts in which under-representation of the political majority can be identified in the legislative and/or administrative process.

One area in which liberal scholars might begin to tap the possibilities suggested above is the increasingly important issue of vital health care. In the scheme of things, it is hard to imagine anything more fundamental than the preservation of life. Yet, this self-evident point is foreign to constitutional fundamental rights discourse. This neglect continues in the face of overwhelming evidence of the severity of America's health care crisis: "Advances in biomedical science, though welcome, will add to costs and will further strain government and private budgets. We can expect additional pressure to restrict existing health insurance policies, to increase patient 'cost-sharing,' and to cut benefits."<sup>182</sup> Even now, the high cost of nursing home care is likely to impoverish a significant portion of our elderly.<sup>183</sup> It is not beyond tomorrow's liberal scholars to propose innovative solutions of a regulatory, statutory and constitutional order.<sup>184</sup>

*c. One possibility for liberal discourse: the evolution of new power-based concepts of constitutional government.* If liberal scholars turn from individual rights consciousness, how will traditional liberal values — that of anti-discrimination or privacy, for example — be protected? Such protection may have less to do with a focus on individual rights than it has to do with the acceptable scope of governmental power as embodied in the majoritarian dictates of the Constitution. That is, by recognizing more exacting standards on the governmental

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Macedo, *Liberal Virtues, Constitutional Community*, note 156 *supra*, at 222 (without public moral standpoint, no internal resistance to communities founded on bigotry and prejudice).

181. By way of a general example, consider Professor Gregory Gelfand's thoughtful article, Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737.

182. Fein, *Toward Adequate Health Care*, DISSENT, Winter 1988, at 98. For an excellent collection of essays on this subject, see HEALTH CARE AND ITS COSTS (C. Schramm ed. 1987). See also Freudenheim, *The Elderly and the Politics of Health Care*, N.Y. Times, May 22, 1988, § 5, at 5, col. 1.

183. Congressman Edward Roybal, chairman of the House Select Committee on Aging, has reported that "[a] year in a nursing home wipes out the income of over 90 percent of the elderly living alone." *Study Says Nursing Home Costs Impoverish Many*, N.Y. Times, Nov. 9, 1987, at 20, col. 2; see also Cody, *Lessons from Abroad: Is the U.S. Ready for National Health Insurance?*, Wash. Post, July 7, 1987, (Health Mag.), at 10.

184. In principle, this is akin to the efforts of Louis Brandeis, Felix Frankfurter, Florence Kelley, and Josephine Goldmark to spawn labor and work safety reforms. See Collins & Friesen, *supra* note 88.

power to administer societal affairs, the interests traditionally labelled as "rights" will be guarded.<sup>185</sup>

A new "power-based" approach, unlike its nineteenth-century ancestor,<sup>186</sup> might have several advantages. First, without invoking the language and categorical analysis of earlier constitutional theory, liberal legal scholars might create new constructs suitable to the contours of the approach. Second, "power-based" theory is more easily reconciled with democratic principles: restraints on governmental administration are imposed in the name of majoritarian limits on power. Third, it has the potential to broaden the spectrum of socioeconomic interests that are "fundamental" to the majority, and that must accordingly be secured by affirmative government.<sup>187</sup> Finally, and perhaps most importantly, because it is not grounded in the authority of social atomism, it avoids the analytical pitfalls of individual rights consciousness.<sup>188</sup>

## V. CONCLUSION

Future functional, doctrinal and normative scholarship will depend on the liberal scholar who grasps the extent of the conservative

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185. Although we do not necessarily endorse the analysis and proposals in Professor Cass Sunstein's recent study of the failures of the national regulatory system established during the New Deal, we recognize that his discussion of the possibilities for constitutional reformation of administrative agencies is in the vein of such "power-based" scholarship. See Sunstein, *supra* note 85. Professor Sunstein argues that protection of the liberal socioeconomic entitlements recognized in the New Deal should be maintained in modern public law, but that the problems of agency capture and factionalism may be checked through a system of coordinated review of an administrative agency that includes a strong supervisory role for all of the branches of the federal government. *Id.* at 452-91. For other such examples, consider the proposals for adaptation of the traditional constitutional concept of "state action" for the functions that may be served by "power-based" norms in Chemerinsky, *supra* note 134 (federal constitutional "state action" doctrine) and Skover, *supra* note 134, at 254-81 (state constitutional "state action" doctrine).

186. For a discussion of the constitutional constructs and the categorical approach that dominated nineteenth-century judicial interpretation of federal and state economic regulatory and police powers, see Skover, *supra* note 84. For useful historical introductions to the alterations in concepts of the relative roles of federal and state governments, see A. SCHLESINGER, *supra* note 21, at 219-55; Harrison, *The "Weakened Spring of Government" Revisited: The Growth of Federal Power in the Late Nineteenth Century*, in *THE GROWTH OF FEDERAL POWER IN AMERICAN HISTORY* (1983).

187. See, e.g., *Planned Parenthood Assn v. Department of Human Resources*, 297 Or. 562, 687 P.2d 785 (1984) (agency erred in following directions from Emergency Board rather than its statutory mandate); LINDE, BUNN, PAFF & CHURCH, *LÉGISLATIVE AND ADMINISTRATIVE PROCESSES* 489-98 (2d ed. 1981); Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 238-44 (1976).

188. As the historian Arthur M. Schlesinger suggests, if liberal scholars "doubt that such problems as the decay of infrastructure, the decline of heavy industry, the crisis of the cities, the growth of the underclass, a generation of young people reared in poverty, unprecedented trade deficits, the flight of jobs to the Third World, can be safely confided to a deregulated marketplace dominated by great corporations," they must face the "political demoralization and intellectual bankruptcy" of traditional individual rights theory and contemporary "interest-group liberalism." A. SCHLESINGER, *supra* note 21, at 249.

overhaul of the federal judiciary and the inadequacies of current liberal theory. Moreover, the growing visibility of conservative legal scholars and their consonance with the federal judiciary and national politics cannot be disregarded.

Consider, for instance, the expanding prominence of the Chicago school of law and economics in the realms of federal constitutional and regulatory law.<sup>189</sup> Consider also the specter of an increasing responsiveness of the federal judiciary to conservative legal scholarship, with the lead taken by Reagan's recent appointments to the Supreme Court.<sup>190</sup> Consider, as well, the advent of generations of law students, who issue from the classrooms of conservative legal scholars to fill the chambers of conservative federal judges as their law clerks, and to proceed thereafter to the high ranks of federal government, to the offices of major law firms, and, to further the cycle, back to the classrooms of nationally recognized law schools.<sup>191</sup> This is not to suggest the inevitability of a conservative capture of the legal profession and professoriat;<sup>192</sup> however, it is critical to appreciate the strength of the new conservative presence in the legal community.

This appreciation should empower us. Liberal scholars should seek viable opportunities beyond, though not exclusive of, the federal courts to affect the directions of public law. They should not underestimate the potential of their scholarship to bolster reform movements. Neither should liberal scholars decline to formulate a new consciousness that surmounts the challenges to their normative agenda. The future of liberal legal scholarship is uncertain in the existing conservative court era. The first step to tomorrow's legal liberalism, however, is today's reality check.

Liberals may view the close of the Reagan era as an occasion for dancing in the streets. A new liberal presidency may alter the Reagan judicial legacy or a more moderate administration may not actively

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189. See *The Constitution as an Economic Document*, 56 GEO. WASH. L. REV. 1 (1987); Katzmann, *The Attenuation of Antitrust*, BROOKINGS REV., Summer 1984, at 23, 25 (the "sharp challenge, mounted by economists and law professors at the University of Chicago and elsewhere, to the conventional assumptions of antitrust analysis" is the "most important element" in a "breakdown of consensus" as to "the deleterious effects of economic concentration and the appropriateness of structural remedies"); note 22 *supra* (conservative and libertarian scholarship in constitutional law).

190. See note 17 *supra* (escalation in trend of conservative constitutional rulings of federal judges appointed by President Reagan).

191. Abramson, note 108 *supra*, at 104.

192. In a post-Reagan era, the new American conservative movement may well face its own "season of frustration, division and discontent." Dionne, *High Tide for Conservatives, But Some Fear What Follows*, N.Y. Times, Oct. 13, 1987, at 1, col. 1; see also Barnes, *Why Can't Conservatives Govern?*, AM. SPECTATOR, May 1988, at 14; Fairlie, *After the Revolution*, NEW REPUBLIC, May 9, 1988, at 15.

seek to further that legacy. But such expectations, heavily dependent on fortune as they are, misunderstand and discount the more lasting problems confronting liberal legalism, the problems discussed in Part IV. If in a post-Reagan era liberal legal scholars compound these problems or even remain oblivious to them, then the cause of enlightened and humane liberalism could suffer in ways never realized by the conservatism that assailed it in the 1980s.

Liberal legal scholars cannot afford to be Neronian; they should not fiddle while their Rome burns. If they do, they may only be "excused by two facts: they do not know that they fiddle; and they do not know that Rome burns."<sup>193</sup>

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193. Adapted from L. STRAUSS, *LIBERALISM ANCIENT AND MODERN* 223 (1968).